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No. 2941

United States
Circuit Court of Appeals

For the Ninth Circuit.

THE QUICKSILVER MINING COMPANY, a
Corporation,

Plaintiff in Error,

vs.

C. P. ANDERSON,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
Second Division.

Filed

APR 11 1917

F. D. Monckton,

Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE QUICKSILVER MINING COMPANY, a
Corporation,

Plaintiff in Error,

vs.

C. P. ANDERSON,

Defendant in Error.

Transcript of Record.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the Superior Court of the State of California, in
and for the County of Santa Clara.*

C. P. ANDERSON,

Plaintiff,

vs.

THE QUICKSILVER MINING COMPANY, a
Corporation,

Defendant.

Complaint.

Plaintiff complains of defendant and for a cause of
action as above-entitled alleges:

I.

That at all times herein mentioned defendant was
and it now is a corporation duly and regularly organized,
acting and existing as such under and by virtue of the laws
of the State of New York, and as such corporation did run
and operate, during all of said period a quicksilver mine
in the County of Santa Clara, State of California, and had
and maintained offices in said County and State, by its agent
and general superintendent.

II.

That said defendant, through its agent and general
superintendent, in the County of Santa Clara, State of
California, employed plaintiff to do certain work and labor
and to perform certain services in the matter of organizing
two certain other corporations, which said corporations are
denominated and known

as the San Jose and Almaden Railroad Company and the Senonac Power Company. [1*]

That said employment covered the organization of said corporations by plaintiff, the assistance of plaintiff in carrying on the business of said corporations, the services of plaintiff in securing options for the purchase of property and rights of way for a railroad, and the purchase of property and options for the purchase of property and water rights and rights of way for said power company, and doing and performing of said other matters and things as might from time to time be required by said defendant in connection with the purposes for which said corporations were to be and were organized.

III.

That said defendant accepted said employment; it was understood and agreed by and between said plaintiff and said defendant that the said plaintiff's compensation for said services should be fixed and determined by and between said plaintiff and said defendant at a period of time when the work so to be done by said plaintiff under said employment was substantially completed, and that when so completed, that the said plaintiff and defendant should then arrive at a reasonable value of the services so rendered by plaintiff, and should settle the value of said services in the amount due said plaintiff from said defendant therefor; and that at the time of the settlement of the amount so due said plaintiff for said services, that the amount so then settled upon for all

*Page-number appearing at foot of page of original certified Transcript of Record.

of said services would at the time of the settlement then and there become due and payable from said defendant to said plaintiff; and that all expenditures made or incurred by said plaintiff for and on behalf of said defendant in the performance of said work and services, should at the same time become due and payable from said defendant to said plaintiff. [2]

IV.

That said plaintiff entered upon and undertook said work and services so required of him by said defendant, and organized said two corporations and assisted in carrying on and conducting the business of the same, and procured options upon property and purchased property for said two corporations, and rights of way for said railroad, and said railroad company and water rights for said power company, and did and performed each and everything in relation to or connected with said employment required of him by said defendant.

V.

That said two corporations were organized for the exclusive benefit of said defendant, and said defendant was the owner of all of the stock in each of the said two corporations, whether the same stood in the name of the defendant upon the books of the said two corporations, or in the name of other persons. That all of the stock of said two corporations which stood in the name of persons other than said defendant was nevertheless in truth and in fact held in trust by such other persons in trust for the benefit of said defendant, and was the property of said defendant.

VI.

That at all times herein mentioned, Charles A. Nones was the President, Agent and General Superintendent of said defendant corporation. That the said employment of plaintiff hereinbefore mentioned was made through, and all the matters and things done and performed by said plaintiff for said defendant, were so done and performed under the instructions and directions of said Charles A. Nones, as such president, agent and general superintendent of said defendant corporation.

VII.

That on or about the 5th day of March, A. D. 1912, the work and labor so to be performed by plaintiff, and the services [3] so to be rendered under said employment were substantially completed, rendered and performed. That upon said day said plaintiff applied to the said Charles A. Nones, as such president, agent and general superintendent of said defendant corporation, for the statement of his account and for a determination and settlement of the amount due plaintiff for all of said work, labor and services and for a settlement and statement and determination of the amount due for moneys expended by plaintiff for and on behalf of said defendant in connection with said employment.

That at said time, said Nones, as such president, agent and superintendent of said defendant corporation, stated and represented to plaintiff that said defendant had purchased and had had delivered to it all steel rails, railroad ties and other equipment

necessary for the construction and completion of the railroad contemplated to be by it constructed under the said name San Jose and Almaden Railroad Company, and that the same would be fully constructed within ninety days from the said 5th day of March, A. D. 1912, and that upon the construction of said railroad said plaintiff would be paid for all moneys laid out by him for the benefit of said defendant in connection with said employment, and would be paid for all services rendered by him, and that at said time the amount and reasonable value to be paid to plaintiff for all services other than services connected with said railroad, and said railroad company would be fixed and the amount of the expenditures so made by said plaintiff would be fixed and settled and both said amounts would be paid, together with the amount and reasonable value for all services rendered in connection with said railroad would then be fully paid; and at said time the said Nones, as such president, agent and general superintendent of said defendant corporation, did fix the amount and value of the services rendered by said plaintiff for said defendant in connection with said railroad [4] and said railroad corporation, and did then and there give to plaintiff a statement in writing fixing the value of work and labor performed and services rendered by said plaintiff for said defendant in connection with said railroad and said railroad corporation at the sum of Four Thousand Five Hundred (\$4500) Dollars, and did then and there and thereby specify that said amount should be payable to said plaintiff

upon the completion of said railroad.

That said plaintiff accepted said statement of the amount so due him from defendant for services so rendered by him in connection with said railroad and said railroad corporation, and then and there agreed to await for the payment of said sum and for a settlement and the payment for said services rendered in connection with and relating to the matter of said power company, and the amount of money expended by plaintiff for and on behalf of the defendant in connection with said employment until the completion of said railroad, all because of the representations then and there so made by defendant's said agent.

VIII.

That upon the 5th day of March, A. D. 1912, when defendant's said agent so represented to said plaintiff that said defendant had purchased and had in its possession the rails, ties and other materials and appliances for the construction of said railroad, and that said railroad would be completed within ninety days from said 5th day of March, A. D. 1912, said representations and statements were false, and were then and there known to be false by defendant's said agent, and were then and there made by defendant's said agent to said plaintiff for the purpose and with the intention in him, defendant's said agent, to deceive and misrepresent the truth concerning said matters and things to said plaintiff. That said plaintiff then and there believed said representations and [5] statements and relied upon the truth of the

same, and was deceived thereby. That in truth and in fact said defendant had never purchased any rails or ties or other appliances for the construction of said railroad, all of which was then and there well known to defendant's said agent; that said railroad was never completed within ninety days from said date, but to the contrary the same has never been started, and nothing has been done towards the construction thereof by said defendant, or by any other person, and said defendant's said agent well knew at the time of making said representations that said railroad would not be completed within ninety days from said 5th day of March, A. D. 1912; that he had no basis in fact upon which to found such a declaration or representation.

That because of the matters and things hereinbefore set forth and because of said false and fraudulent misrepresentations so made by defendant's said agent to said plaintiff, said plaintiff did not then and there, to wit: upon said 5th day of March, A. D. 1912, procure from defendant's said agent a full settlement of the accounts existing between plaintiff and defendant, and did not procure from defendant's said agent a stated account and determination of the amount due and payable from defendant to plaintiff for plaintiff's services with said power company, or a stated account or determination of the amount due plaintiff from defendant because of moneys expended by plaintiff for and on behalf of said defendant as aforesaid, but because of said false and fraudulent representations and plaintiff's belief therein and his

reliance upon the truth of the same, said plaintiff consented that the determination and statement of said account be had and made at the time of the completion of said railroad, and that the amount determined upon as due therefor, be paid at the time of the completion of said railroad, and that the amount of \$4500.00 agreed upon as being due for plaintiff's [6] services in connection with said railroad, be paid upon the completion of said railroad, and had it not been for said false and fraudulent representations aforesaid, and had it not been for plaintiff's faith in and reliance upon the truth of said representations, said plaintiff would not then have consented to the acceptance of payment of said amounts, or either of them, at the time of the completion of said railroad, and plaintiff alleges that because of the matters and things hereinbefore set forth that the amounts so due plaintiff for said services, and for moneys expended for and on behalf of defendant became due and payable from said defendant to plaintiff upon the 5th day of March, 1912, and the same ever since have been and are now, and each of said amounts ever since has been and is now due, owing, payable and unpaid from said defendant to said plaintiff.

IX.

That the reasonable value of said work and labor performed and services rendered for and on behalf of said defendant in connection with and relating to said railroad and said railroad corporation is the sum of \$4500.00.

That the reasonable value of the work and labor performed and services rendered in connection with said water rights and said power company is the sum of \$2500.00.

That the amount of money expended by said plaintiff for defendant's use and benefit in connection with said employment is the sum of \$411.00.

That no part of said sums, or either of them, have been paid plaintiff, and the aggregate amount thereof, to wit: Seven Thousand Four Hundred and Eleven (\$7411.00) is now due, owing, payable and unpaid from said defendant to plaintiff, and has been so due ever since said 5th day of March, A. D. 1912.
[7]

WHEREFORE, plaintiff prays judgment against defendant for the sum of Seven Thousand Four Hundred and Eleven (\$7411.00) Dollars, together with interest thereon at the legal rate, from the 5th day of March, A. D. 1912, until the day of Judgment, together with his costs herein.

B. A. HERRINGTON,
Attorney for Plaintiff.

State of California,
County of Santa Clara,—ss.

C. P. Anderson, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the above and foregoing complaint and known the contents thereof; that the same is true of his own knowledge except to the matters and things therein stated upon his information and belief, and as to those matters he believes it to be true.

C. P. ANDERSON.

10 *The Quicksilver Mining Company*

Subscribed and sworn to before me this 21 day of February, A. D. 1914.

[Seal]

J. C. BLACK,

Notary Public in and for the County of Santa Clara,
State of California.

[Endorsed]: Filed Feb. 21, 1914. Henry A. Pfister, Clerk. By Archer Bowden, Deputy. [8]

*In the Superior Court of the State of California, in
and for the County of Santa Clara.*

No. 21400.

Dept. 3.

C. P. ANDERSON,

Plaintiff,

vs.

THE QUICKSILVER MINING COMPANY, a
Corporation,

Defendant.

**Petition for Removal of the Within Entitled Suit to
the District Court of the United States for the
Northern District of California.**

To the Honorable the Superior Court of the State of
California, in and for the County of Santa
Clara:

Your petitioner, The Quicksilver Mining Com-
pany, a corporation, respectfully shows:

That this suit is of a civil nature at law, wherein
plaintiff seeks to recover of this petitioner the sum of
Seven thousand, four hundred and eleven dollars
(\$7,411), for work and labor performed, and services

rendered, and for moneys expended by plaintiff for defendant's use and benefit.

That therefor the matter and amount in dispute in the above-entitled suit exceeds the sum or value of three thousand dollars (\$3,000), exclusive of interest and costs.

That the controversy in said suit is, and at the time of the commencement of this suit was between citizens [9] of different States, and that your petitioner, the defendant in the above-entitled suit, was, at the time of the commencement of this suit, and still is, a corporation duly organized existing and doing business under and by virtue of the laws of the State of New York, and was, at the time of the commencement of this suit, and still is, a resident of and a citizen of the State of New York, and a nonresident of the State of California; and that the plaintiff, C. P. Anderson, was, at the time of the commencement of the above-entitled suit, and still is, a resident and citizen of the County of Santa Clara, State of California.

That your petitioner has filed herein and offers herewith a bond, with good and sufficient surety, for its entering in the District Court of the United States, for the Northern District of California, within thirty days from the filing of this petition, a certified copy of the record in this suit, and for paying all costs that may be awarded by said District Court, and if said District Court shall hold that this suit was wrongfully or improperly removed thereto; and also for its appearing and entering special bail in such suit, if special bail was originally requisite therein.

Your petitioner therefore prays this Honorable Court to proceed no further herein, except to make the order of removal required by law and to accept the said bond and cause the record herein to be removed into said District Court of the United States for the Northern District of California; and it will ever pray.

THE QUICKSILVER MINING COMPANY.

By W. H. LANDERS,
General Manager.

H. E. WILCOX,
D. M. BURNETT,
A. H. JARMAN,

Attorneys for Petitioner. [10]

State of California,
City and County of San Francisco,—ss.

A. H. Jarman, being first duly sworn, deposes and says:

That he is one of the attorneys for the above-named defendant, The Quicksilver Mining Company, and has his office in the Merchants National Bank Building, in the City and County of San Francisco, State of California; that he makes this verification for and in behalf of this defendant for the reason that the officers of said corporation, The Quicksilver Mining Company, are at present absent from the City and County of San Francisco, where affiant has his said office.

That affiant has read the foregoing Petition, and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which

are therein stated on information or belief, and as to those matters, that he believes it to be true.

A. H. JARMAN.

Subscribed and sworn to before me this 7th day of March, 1914.

[Seal] CHARLES R. HOLTON,
Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Mar. 9, 1914. Henry A. Pfister, Clerk. By Archer Bowden, Deputy. [11]

*In the Superior Court of the State of California, in
and for the County of Santa Clara.*

No. 21400.

Dept. No. 3.

C. P. ANDERSON,

Plaintiff,

vs.

THE QUICKSILVER MINING COMPANY,
a Corporation,

Defendant.

Bond.

KNOW ALL MEN BY THESE PRESENTS:
That The Quicksilver Mining Company, a corporation, as principal, and Illinois Surety Company, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, as surety, are held and firmly bound unto C. P. Anderson, in the sum of one thousand dollars (\$1,000) for the payment of which well and truly to be made

unto the said C. P. Anderson, his heirs, executors, administrators and assigns, The Quicksilver Mining Company and the Illinois Surety Company bind themselves, their successors and assigns jointly and firmly by these presents; upon condition nevertheless, that

WHEREAS, the above-named C. P. Anderson has commenced a suit of a civil nature in the Superior Court of the State of California, in and for the County of Santa Clara, against the said Quicksilver Mining Company, a corporation; and

WHEREAS, the said Quicksilver Mining Company, simultaneously with the filing of this bond, intends to file its petition in the said suit in said court for the removal of such suit into the District Court of the United States in the district where such suit is pending, to wit, the District Court of the United States for the Northern District *District* of California, according to the provisions of the Act of Congress in such case made and provided; [12]

Now, therefore, the condition of this obligation is such that if said petitioner the Quicksilver Mining Company, a corporation, shall enter in the District Court of the United States for the Northern District of California, within thirty days from the date of filing said petition, a certified copy of the record in such suit and shall well and truly pay all costs that may be awarded by the said District Court if said District Court shall hold that such suit was wrongfully and unlawfully removed thereto, and *and* shall also appear and enter a special bail in such suit, if special bail was originally requisite therein,

then the above obligation shall be void, but shall otherwise remain in full force and virtue.

In witness whereof, said The Quicksilver Mining Company has caused these presents to be executed, and its corporation name to be hereunto affixed, by its General Manager thereunto duly authorized, and the said Illinois Surety Company has caused these presents to be executed and its corporation name and seal to be hereunto affixed by C. T. Hughes, its attorney in fact, this 7th day of March, 1914.

THE QUICKSILVER MINING COMPANY.

By W. H. LANDERS,
General Manager.

ILLINOIS SURETY COMPANY.

[Seal] By CHARLES T. HUGHES,
Its Attorney in Fact.

State of California,

City and County of San Francisco,—ss.

On this 7th day of March, one thousand nine hundred and fourteen, before me, Charles R. Holton, a notary public in and for the City and County, residing therein, duly commissioned [13] and sworn, personally appeared Charles T. Hughes, known to me to be the person whose name is subscribed to the annexed instrument as the attorney in fact of the Illinois Surety Company, and acknowledged to me that he subscribed the name of the Illinois Surety Company thereto as principal and his own name as attorney in fact.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the City

and County of San Francisco, the day last above written.

[Seal]

[Seal] CHARLES R. HOLTON,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Mar. 9, 1914. Henry A. Pfister, Clerk. By Archer Bowden, Deputy. [14]

*In the Superior Court of the State of California, in
and for the County of Santa Clara.*

C. P. ANDERSON.

Plaintiff,

VS.

THE QUICKSILVER MINING COMPANY,
a Corporation,

Defendant.

Notice of Presentation of Petition and Bond for Removal to Federal Court.

To the Above-named Plaintiff, C. P. Anderson, and
to B. A. Herrington, His Attorney:

You and each of you will please take notice that on Monday the 9th day of March, A. D. 1914, at the hour of two o'clock P. M., of this day the above-named defendant will file in the above-named Court, in Department No. 3 thereof, its petition and bond as required by law for the removal of said cause from the above-entitled court to the District Court of the United States, for the Northern District of California, and also a bond in the sum of one thousand dollars (\$1,000.00), given on such removal according to law and the requirements of the

statutes in such cases made and provided, and copies of said bond and said petition are herewith served, and upon the filing of said petition and bond the defendant will present and call to the attention of said Superior Court the said petition and bond and move the said Superior Court for an order of removal of said action from said Superior Court to said District Court of the United States for the Northern District of California, and the said motion for removal upon the grounds as stated in said petition and upon said petition and bond so filed and presented.

H. E. WILCOX,
D. M. BURNETT,
A. H. JARMAN,

Attorneys for said Defendants.

[Endorsed]: Filed Mar. 9, 1914. Henry A. Pfister, Clerk. By Archer Bowden, Deputy. [15]

*In the Superior Court of the State of California, in
and for the County of Santa Clara.*

C. P. ANDERSON,

Plaintiff,

vs.

THE QUICKSILVER MINING COMPANY,
a Corporation,

Defendant.

Order for Removal.

Upon reading and filing the petition and bond of the defendant The Quicksilver Mining Company, a corporation, for removal of the above-entitled action to the District Court of the United States for the

Northern District of California, and it appearing to the Court that written notice of said petition and bond for removal was given by defendant to plaintiff prior to filing said petition and bond, and this matter duly coming on for hearing, said bond is hereby approved and accepted as good and sufficient, and it is hereby ORDERED that said cause be and the same is hereby removed to the District Court of the United States for the Northern District of California.

Dated this 9th day of March, A. D. 1914.

J. R. WELCH,

Judge.

[Endorsed]: Filed Mar. 9, 1914. Henry A. Pfister, Clerk. By Archer Bowden, Deputy. [16]

State of California,

County of Santa Clara,—ss.

I, Henry A. Pfister, County Clerk of the County of Santa Clara, State of California, and Clerk of the Superior Court in and for said County, do hereby certify the annexed to be a true, full and correct copies of the Original Complaint, Petition for Removal, Bond, Notice of Filing of Petition and Bond, and Order for Removal in action of C. P. Anderson vs. The Quicksilver Mining Company (No. 21,400); and that the same constitute the record therein, and are now of record and on file in said Court.

In Witness Whereof, I have hereunto set my hand

and affixed the seal of the said Superior Court, this 6th day of April, A. D. 1914.

[Seal]

HENRY A. PFISTER,
County Clerk.
By Archer Bowden,
Deputy Clerk.

[Endorsed]: No. 15,752. U. S. District Court, Northern District of California, 2d Division. C. P. Anderson, Plaintiff, vs. The Quicksilver Mining Co., a Corporation, defendant. Record on Removal. Filed Apr. 8, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [17]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

C. P. ANDERSON,

Plaintiff,

vs.

THE QUICKSILVER MINING COMPANY,
a Corporation,

Defendant.

Demurrer.

Comes now the above-named defendant, The Quicksilver Mining Company, a corporation, and demurs to the complaint on file herein, and for grounds of demurrer, specifies:

I.

That several causes of action have not been separately stated, to wit, an action upon an account stated to recover the sum of forty-five hundred dol-

lars (\$4,500), an action to recover the reasonable value of the work and labor performed and services rendered, in connection with, and relating to, said water rights and said Power Company, in the sum of twenty-five hundred dollars (\$2,500), and an action to recover money expended by plaintiff for defendant's use in the sum of four hundred and eleven dollars (\$411).

II.

That said complaint does not state facts sufficient to constitute a cause of action. [18]

III.

Defendant specially demurs to said complaint in that it does not appear that said Charles A. Nones, as president, agent, and general superintendent, had the right and power for and in behalf of said defendant corporation, to engage or employ plaintiff to perform the services, or make the expenditures claimed as set forth in said complaint.

WHEREFORE said defendant prays that said plaintiff take nothing by his said action, and that it be hence dismissed with its costs herein expended.

Dated: May 8th, 1914.

A. H. JARMAN,

Attorney for Defendant, The Quicksilver Mining Company.

The undersigned, counsel for the defendant in the above-entitled cause, does hereby certify that the foregoing demurrer is not filed for delay, and that

in the opinion of said counsel the same is well taken in point of law.

A. H. JARMAN,
Attorney for Defendant, The Quicksilver Mining
Company.

[Endorsed]: Filed May 8, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [19]

At a stated term, to wit, the July term, A. D. 1914,
of the District Court of the United States of
America, in and for the Northern District of
California, Second Division, held at the court-
room in the City and County of San Francisco,
on Monday, the 13th day of July, in the year of
our Lord one thousand nine hundred and four-
teen. Present: The Honorable WILLIAM C.
VAN FLEET, District Judge.

The Honorable WILLIAM C. VAN FLEET,
District Judge.

No. 15,752.

C. P. ANDERSON

vs.

THE QUICKSILVER MINING COMPANY.

Order Overruling Demurrer.

Defendant's demurrer having been called on three
consecutive law calendars without answer, it is
ordered that said demurrer be and the same is here-
by overruled for want of prosecution. [20]

*In the District Court of the United States for the
Northern District of California, Second Division.*

No. 15,752.

C. P. ANDERSON,

Plaintiff,

vs.

THE QUICKSILVER MINING COMPANY,
a Corporation,

Defendant.

Answer.

Comes now the above-named defendant, The Quicksilver Mining Company, a corporation, and answering plaintiff's complaint, avers, admits and denies as follows:

I.

Admits that at all times mentioned in the complaint that the defendant was and is a corporation created and existing under and by virtue of an Act of the Legislature of the State of New York; admits that said defendant did run and operate, and that it does now run and operate a quicksilver mine at New Almaden, in the County of Santa Clara, State of California, and that it there maintained, and does now maintain its principal office and place of business in this State.

II.

Denies that through its agent and general superintendent, or agent or general superintendent, that this [21] defendant employed plaintiff to do cer-

tain work and labor, or work or labor, and to perform certain services, or perform certain services in the matter of organizing two certain other corporations or any corporation denominated and known, or denominated or known as San Jose and Almaden Railroad Company or Senonac Power Company, or denominated or known by any other name.

This defendant has no information or belief sufficient to enable it to answer the allegations of that part of Paragraph II of plaintiff's complaint, lines 1 to 10, inclusive, page 2 thereof, and basing its denial thereon, denies that said alleged employment of plaintiff covered the organization of said corporations by plaintiff, or the organization of any corporations by plaintiff or any other person, or covered the assistance of plaintiff in carrying on the business of said corporations, or either of them, or covered the services of plaintiff in securing options for the purchase of property and rights of way, or property or rights of way, for a railroad or for any other purpose, or the purchase of property and options, or property or options for the purchase of property and water rights and rights of way, or property, or water rights, or rights of way, for said power company; denies that the said alleged employment of plaintiff covered the doing and performing, or doing or performing of said other matters and things, or other matters or things, as might, from time to time, be required by defendant in connection with the purposes for which said alleged corporations were to be, and were, organized. [22]

III.

Denies that defendant accepted said employment; denies that defendant ever employed plaintiff to perform said alleged services set forth in plaintiff's complaint, or any other service, at any time or at all; denies that it was understood and agreed, or understood or agreed, by and between plaintiff and defendant, that plaintiff's compensation for said alleged services should be fixed and determined, or fixed or determined, by and between plaintiff and defendant at a period of time when the alleged work to be done by said plaintiff under said alleged employment, was substantially completed; denies that when said alleged employment was substantially completed, that plaintiff and defendant should then arrive at a reasonable value, or any value, for the said alleged services so rendered by plaintiff; denies that plaintiff and defendant should then settle the value of said alleged services in the amount due plaintiff from defendant therefor; denies that at the time of said alleged settlement of the amount so due plaintiff for said alleged services, that the amount then settled or agreed upon for said alleged services would, at the time of such settlement, then and there become due and payable, or due or payable, from defendant to plaintiff; denies that all expenditures made or incurred; or made and incurred by plaintiff for and on behalf, or for or on behalf of defendant, in the performance of said work and services, or work or services, or any other work or services, should, at the same time,

become due and payable, or due or payable from said defendant to plaintiff. [23]

IV.

Denies that said plaintiff entered upon and undertook, or entered upon or undertook, said work and services, or work or services, so required of him by defendant; denies that plaintiff organized said two corporations, or any other corporations, at the instance and request, or instance or request of defendant; denies that plaintiff assisted in carrying on and conducting, or assisted in carrying on or conducting the business of said corporations, or either of them, or any business of this defendant.

Defendant has no information or belief sufficient to enable it to answer the allegations in Paragraph IV of plaintiff's complaint, to wit:

“and procured options upon property and purchased property for said two corporations, and rights of way for said railroad and said railroad company, and water rights for said power company,”

and placing its denial upon that ground, this defendant denies said allegations, and each and all thereof; denies that said plaintiff did and performed, or did or performed, each and every thing, or each or every thing in relation to or connected with, or in relation to and connected with said alleged employment required of him by defendant, and in this behalf, defendant avers the fact to be that it never at any time employed plaintiff to perform any services for it, either in connection with said alleged San Jose and

Almaden Railroad Company or said Senonac Power Company, or any other corporation, and further avers that it never authorized any employee, agent or any officer of this defendant to employ said plaintiff for any purpose [24] whatever, and in this behalf defendant avers that no agent, employee or officer of this corporation was ever authorized, or ever had any authority or power to make any contract of employment with plaintiff for his services in connection with said railroad company or said power company, or either of them, or any other corporation, other than for services to be rendered by plaintiff or any other person to this defendant for purposes of its business as authorized by its charter granted by the Legislature of the State of New York, and by and under which it is created and exists as a corporation.

V.

Denies that said two corporations, or either of them, were organized for the exclusive benefit of this defendant; denies that this defendant was the owner of all of the stock in each of said two corporations, or either of them; denies that all of the stock of said two corporations, or either of them, standing in the name of persons other than the name of this defendant, was, in truth and in fact, or in truth or in fact, held in trust by such other persons for the use and benefit, or use or benefit of this defendant; denies that such stock was the property of this defendant.

VI.

Admits that at all the times mentioned in plain-

tiff's complaint, Charles A. Nones was the President of the Board of Directors of this defendant; denies that said Charles A. Nones was the agent and general superintendent [25] of defendant; denies that the employment of plaintiff, mentioned in the complaint herein, was made through, and all the matters and things done and performed, or all the matters or things done or performed by plaintiff for defendant were so done and performed, or done or performed, under the instructions and directions, or instructions or directions of said Charles A. Nones as such president, agent and general superintendent, or president, or agent, or general superintendent of this defendant.

VII.

Defendant avers that it has no information or belief sufficient to enable it to answer the allegations of Paragraph VII of plaintiff's complaint, and placing its denial upon that ground, denies each and every allegation thereof, as though the same, and each of them, were specifically denied, except that this defendant denies that said Charles A. Nones, at any time mentioned in the complaint, was the agent and superintendent, or agent or superintendent of this defendant, other than the fact that said Nones was the president of the Board of Directors of this defendant, and nothing more, and in this behalf defendant avers that said Nones had no authority as such president to employ plaintiff, in behalf of this defendant, to perform any service whatever in connection with said railroad company, the said

power company, or any other company, other than for services to be performed by plaintiff in connection with the business for which this defendant was created, to wit, the mining and marketing of quicksilver, in which business this defendant has engaged continuously [26] since its charter was granted to it by the Legislature of the State of New York in the year 1866.

VIII.

Defendant has no information or belief sufficient to enable it to answer the allegations contained in Paragraph VIII of the complaint herein, and placing its denial upon that ground, denies generally each and every allegation therein contained, as fully as though the same, and each thereof, were specifically denied, except that said defendant denies that said Nones was the agent of this defendant, and in this behalf defendant avers the facts to be, that said Nones was the president of the Board of Directors of this defendant, and had no authority to represent this defendant in any matter other than such as was conferred upon him by virtue of his office as president of the Board of Directors; denies that the amounts alleged in the complaint herein to be due plaintiff for said services, and for moneys expended for and on behalf of defendant, or for services or for moneys expended for or on behalf of defendant, because due and payable, or became due or payable, from defendant to plaintiff upon the 5th day of March, 1912, or at any other time or at all; denies that same ever since have been and are now,

and each of said amounts, or any or all of said amounts, have been and are now due, owing, payable and unpaid, or due, or owing, or payable, or unpaid from defendant to plaintiff.

IX.

Denies that the reasonable value of said work and [27] labor performed and services rendered for and on behalf of defendant, or work or labor performed or services rendered for or on behalf of defendant, in connection with and relating to, or in connection with or relating to said railroad and said railroad corporation, or said railroad, or said railroad corporation, is the sum of four thousand five hundred dollars (\$4,500), or any other sum or at all.

Denies that the reasonable value of the work and labor performed and services rendered in connection with and relating to said water rights and said power company, or said work or said labor performed or services rendered in connection with and relating to, or in connection with, or relating to said water rights or said power company, is the sum of two thousand five hundred dollars (\$2,500), or any other amount or at all.

Denies that the amount of money expended by plaintiff for defendant's use and benefit, or defendant's use or benefit, in connection with said alleged employment, is the sum of four hundred and eleven dollars (\$411), or any other sum or at all.

Admits that no parts of said sums, or either of them, have been paid to plaintiff by this defendant; denies that the sum of seven thousand four hundred

and eleven dollars (\$7,411) is now due, owing, payable and unpaid, or is now due, or is now owing, or is now payable, or is now unpaid from defendant to plaintiff; denies that said sum, or any other sum, has been so due to plaintiff from defendant since the 5th day of March, A. D. 1912, or at any other time or at all. [28]

AND FOR A SECOND AND SEPARATE DEFENSE, defendant avers:

I.

That since April 10, 1866, defendant has been, and now is, a corporation, by name "The Quicksilver Mining Company," created and existing under and by virtue of an Act of the Legislature of the State of New York, which Act has not been modified or repealed, and is now in full force and effect, in words and figures following, to wit:

CHAP. 470.

AN ACT to Incorporate the Quicksilver Mining Company.

Became a law April 10, 1866, with the approval of the Governor. Passed, a majority being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Samuel G. Arnold, William Bond, John A. Collier, Edwin Hoyt, Edwin J. Nightingale, Samuel L. M. Barlow, George J. Forrest, John Elliot, and their associates, be, and they hereby are, created a body politic, by the name, style and title of "The Quicksilver Mining Company" and by such name

and title shall have perpetual succession, and shall be capable of suing and being sued, impleading and being impleaded, and of granting and receiving, in its corporate name, property, real, personal and mixed, and of holding and improving lands in California or elsewhere, and to obtain therefrom any and all minerals and other valuable substances, whether by working or mining, leasing or disposing of privileges to work or mine such lands, or any part thereof, and to erect houses and such other buildings and works as may properly appertain to said business, and to use, let, lease or work the same, and to dispose of the products of all such lands, mines and works as they may deem proper. [29]

2. The said company shall have power to make such by-laws as they may deem proper to enable them to carry out the objects of the corporation, and the same to alter, amend, add to, or repeal at their pleasure, provided that such by-laws shall not be contrary to the constitution of this State, or the provisions of this act, and to adopt a common seal, and the same to alter at pleasure, and to issue certificates of stock, representing the value of their property in such form and subject to such regulations as they may from time to time, by their by-laws, prescribe, and to regulate and prescribe in what manner and form their contracts and obligations shall be executed.

3. The corporators named in this act shall elect persons to serve as directors, a majority of whom shall constitute a quorum for the transaction of busi-

ness, and shall hold their offices until their successors shall have been elected in accordance with the by-laws.

4. It shall be lawful for said company to establish the necessary offices for the business of the company wherein their business is located, and to have their principal office in the United States, in such place as they may deem expedient, at which place it shall be lawful to hold all meetings for the transaction of the business of the company.

II.

That this defendant was not, and has never been authorized by law, to take and hold, or to take or hold, real or personal property, or to make contracts in connection therewith, except such as were and are needed and necessary for its business of mining, and in this behalf, defendant avers that since its creation, as aforesaid, this defendant has never engaged in any business other than that of mining and the operation of reduction works on its mining properties, located at New Almaden, in the County of Santa Clara, State of California, generally known and designated throughout the world as "The New Almaden Quicksilver Mines," [30] which operations resulted in the production of quicksilver, which commodity was and is sold by this defendant.

III.

That said alleged contracts of employment set forth in plaintiff's complaint, and plaintiff's alleged services thereunder were and are for purposes without the power of this defendant to legally execute or authorize, to wit:

Alleged services by plaintiff in organizing two certain other corporations under the laws of the State of California, for the alleged exclusive benefit of this defendant, denominated and known as (1) San Jose and Almaden Railroad Company, and (2) Senonac Power Company, for services assisting in carrying on the business of said corporations, securing options for the purchase of property, and rights of way, and the purchase of property for a proposed railroad between the city of San Jose, County of Santa Clara, State of California, and New Almaden, in said county, all for and in behalf of said railroad company, for services in the purchase of property and options for the purchase of property and water rights and rights of way for said power company, and the doing and performing of such other matters and things as might be required in connection with the purposes for which said railroad company and said power company were to be, and for which they were apparently organized.

IV.

Defendant avers that the organization of said railroad company and said power company, and the alleged employment of plaintiff in connection therewith, were not authorized [31] by its Board of Directors, or by its stockholders, and that same have not been ratified or confirmed by said Board of Directors, or by said stockholders; that said C. A. Nones was not authorized by said Board of Directors or by the stockholders of this defendant, to organize said railroad company and said power com-

pany, or to employ plaintiff to perform any services in connection therewith; that the alleged action of the said C. A. Nones in employing plaintiff to perform services in behalf of this defendant in connection with said railroad company and said power company have not been ratified or approved by the Board of Directors of this defendant, or by its stockholders, and in this behalf defendant avers that it is informed and believes, and therefore alleges, that the organization of said railroad company and said power company were private projects, attempted and fostered by said C. A. Nones and plaintiff for their joint benefit, in order to create a "boom" in the real estate market for the lands along the line of said proposed railroad between said City of San Jose and New Almaden, that the said C. A. Nones and plaintiff might make a profit by dealing in real estate during said anticipated real estate boom, and that said Nones and plaintiff, without right or authority, and in order to further their private interests, represented and made it appear that their acts in connection therewith had been duly authorized by the stockholders of this defendant.

That said railroad company and said power company were and are wholly unnecessary and useless to defendant in its business of mining, and are not in any way connected with said business or incidental thereto, and defendant avers that [32] it has never received or accepted any benefits or other thing of profit by reason of the organization of said corporations and plaintiff's alleged services in connection

therewith as set forth in his complaint herein.

WHEREFORE, this defendant prays judgment that it be hence dismissed with its costs.

A. H. JARMAN,
Attorney for Defendant. [33]

State of California,
City and County of San Francisco,—ss.

A. H. Jarman, being first duly sworn, deposes and says: That he is the attorney for the above-named defendant, The Quicksilver Mining Company; that he has read the above and foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters, that he believes it to be true.

Affiant further avers that he has his office in the City and County of San Francisco, State of California; that said defendant and all the officers of said defendant are presently absent from the said City and County of San Francisco, where affiant has his said office, and for that reason affiant makes this verification for and on behalf of said defendant.

A. H. JARMAN.

Subscribed and sworn to before me this 24th day of November, 1914.

[Seal] CHARLES R. HOLTON,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Nov. 25, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [34]

*In the District Court of the United States, Northern
District of California.*

C. P. ANDERSON,

Plaintiff,

vs.

THE QUICKSILVER MINING COMPANY, a
Corporation,

Defendant.

Stipulation Waiving Trial by Jury.

IT IS HEREBY STIPULATED that the above-entitled cause may be tried without a jury, and a jury is hereby expressly waived by the parties hereto.

Dated this 26th day of February, A. D. 1915.

B. A. HERRINGTON,
Attorney for Plaintiff.

A. H. JARMAN,
Attorney for Defendant.

[Endorsed]: Filed March 1, 1915. Walter B. Maling, Clerk. [35]

At a stated term, to wit, the July term, A. D. 1916, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Saturday, the 14th day of October, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable BEN-

JAMIN F. BLEDSOE, District Judge, for the Southern District of California, designated to hold and holding this Court.

No. 15,752.

C. P. ANDERSON

vs.

THE QUICKSILVER MINING CO.

Order That Findings be Filed and Judgment Entered.

Ordered that the findings of fact and conclusions of law herein be filed and that the judgment as signed by the Judge be filed and entered. [36]

In the District Court of the United States, for the Northern District of California, Second Division.

C. P. ANDERSON,

Plaintiff,

vs.

THE QUICKSILVER MINING COMPANY, a Corporation,

Defendant.

Findings of Fact and Conclusions of Law.

The above-entitled cause came on regularly for trial before the Court sitting without a jury, a jury in said matter having been expressly waived by the parties. B. A. Herrington, Esq., appeared as counsel for plaintiff, and A. H. Jarman, Esq., appeared as counsel for defendant. Oral and documentary evidence was offered and received in evidence, and the

said matter having been fully and finally submitted to the Court for its determination, the Court now finds the following facts:

First. That at all times herein mentioned, defendant was and it now is a corporation duly and regularly organized, acting and existing as such under and by virtue of the laws of the State of New York; and, as such corporation, did run and operate, during all of said period, a quicksilver mine in the county of Santa Clara, State of California; and had and maintained offices in said county and State, and was represented in said county and State by its agent and superintendent.

Second. That said defendant, through its agent, general superintendent and president, in the county of Santa Clara, State of California, employed plaintiff to do certain work and labor and to perform certain services in the matter of organizing two certain other corporations; which said corporations were denominated and known as the "San Jose and Almaden Railroad Company" [37] and the "Se-nonac Power Company."

That said employment covered the organization of said corporations by the plaintiff, the assistance of plaintiff in carrying on the business of said corporations, the services of plaintiff in securing options for the purchase of property and rights of way for said railroad, and the purchase of property and the securing of options for the purchase of property and water rights and rights of way for said water-power company, and the doing and performing of such other matters and things as might from time to

time be required of plaintiff by said defendant in connection with the purposes for which said corporations were to be and were organized.

Third. That said defendant accepted said employment. That at the time of accepting said employment, it was understood and agreed by and between plaintiff and defendant, that plaintiff's compensation for said services should be fixed and determined by and between plaintiff and defendant at a period of time when the work so to be done by plaintiff under said employment was substantially completed; and that when so completed, that the plaintiff and defendant should then arrive at a reasonable value of the services so rendered by plaintiff, and should settle the value of said services in the amount due plaintiff from defendant therefor; and that at the time of the settlement of the amount so due plaintiff for said services, then the amount so settled upon for all services would, at the time of the settlement, then and there become due and payable from defendant to plaintiff; and that all expenditures made or incurred by plaintiff for and on behalf of said defendant in the performance of said work and services, should at the same time become due and payable from defendant to plaintiff.

Fourth. That plaintiff entered upon and undertook said work and [38] services so required of him by defendant, and organized said two corporations and assisted in carrying on and conducting the business of the same, and procured options upon property and purchased property for said two corporations and rights of way for said railroad and rail-

road company and water rights for said power company, and did and performed each and every thing in relation to or connected with said employment required of him by defendant.

Fifth. That said two corporations were organized for the exclusive benefit of defendant, and defendant was the owner of all the stock in each of the said two corporations, whether the same stood in the name of the defendant upon the books of the said two corporations, or in the name of other persons. That all of the stock of said two corporations which stood in the name of persons other than defendant was nevertheless in truth and in fact held in trust by such other persons for the use and benefit of defendant, and was the property of defendant.

Sixth. That at all times herein mentioned, Charles A. Nones was the president, agent and general superintendent of said defendant corporation. That the said employment of plaintiff hereinbefore mentioned, was made through, and all the matter and things done and performed by said plaintiff for said defendant, were so done and performed under the instructions and directions of said Charles A. Nones, as such president, agent and general superintendent of said defendant corporation.

Seventh. That the reasonable value of said work and labor performed and services rendered for and on behalf of said defendant in connection with and relating to said railroad and said railroad corporation is the sum of \$4500.

That the reasonable value of the work and labor performed and services rendered in connection with

and relating to said water rights and said power company is the sum of \$2500. [39]

That the amount of money expended by said plaintiff for defendant's use and benefit in connection with said employment is the sum of \$411.

That no part of said sums, or either of them, have been paid plaintiff, and the aggregate amount thereof, to wit, seven thousand four hundred and eleven (\$7,411) is now due, owing, payable and unpaid from said defendant to plaintiff, and the same became due and owing and payable, and has been so due, owing and payable since said 5th day of March, A. D. 1912.

Eighth. And the Court further finds that the employment of said plaintiff as set forth and alleged in plaintiff's complaint was the employment by defendant; and that the said work and labor performed and services rendered were so performed and rendered by said plaintiff under said defendant's employment of said plaintiff; and that the said expenditures of money by said plaintiff were so made for the use and benefit of said defendant, and under defendant's employment of said plaintiff, and that said defendant is obligated to compensate said plaintiff in the amount of the reasonable value of the said work and services and in the amount of said expenditures so made by plaintiff for the use and benefit of said defendant; and that upon the 5th day of March, A. D. 1912, there became due, owing and payable from defendant to plaintiff the said sum of \$7,411, no part of which has ever been paid, and that the same is so now due, owing, payable and unpaid together

with interest thereon at the rate of seven per cent per annum from the 5th day of March, A. D. 1912.

AS CONCLUSIONS OF LAW the Court finds:

That upon the 5th day of March, A. D. 1912, there became due, owing and payable from defendant to said plaintiff the sum of seven thousand four hundred and eleven (\$7,411) dollars; that no part of said sum has ever been paid to plaintiff, and [40] that the whole thereof is still due and owing from defendant to plaintiff.

That plaintiff is entitled to Judgment from defendant for said sum together with interest thereon at the rate of seven per cent per annum from said 5th day of March, A. D. 1912, together with costs of suit.

Let Judgment be entered accordingly.

Dated: October 14, A. D. 1916.

BENJAMIN F. BLEDSOE,

Judge.

[Endorsed]: Filed October 14, 1916. Walter B. Maling, Clerk. [41]

In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,752.

C. P. ANDERSON,

Plaintiff,

vs.

THE QUICKSILVER MINING COMPANY, a Corporation,

Defendant.

Judgment.

The above-entitled cause came on regularly for trial before the Court sitting without a jury, a jury in said matter having been expressly waived by the parties. B. A. Herrington, Esq., appeared as counsel for plaintiff, and A. H. Jarman, Esq., appeared as counsel for defendant. Oral and documentary evidence was offered and received in evidence, and the said matter having been fully and finally submitted to the Court for its determination, and the Court having given, made and entered its Findings of Fact and Conclusions of Law, now, upon motion of B. A. Herrington, Esq., attorney for plaintiff, it is hereby Ordered, Adjudged and Decreed, and the Court does here now Order, Adjudge and Decree that said plaintiff have and recover of and from defendant the sum of seven thousand four hundred and eleven (\$7,411) dollars together with interest thereon at the rate of seven per cent per annum from the 5th day of March, A. D. 1912, until the date of the payment of said judgment, together with costs of suit taxed at \$155.20.

Dated: October 14, 1916.

BENJAMIN F. BLEDSOE,

Judge.

[Endorsed]: Filed and entered October 14, 1916.
Walter B. Maling, Clerk. [42]

*In the Southern Division of the District Court of the
United States for the Northern District of Cali-
fornia, Second Division.*

No. 15,752.

C. P. ANDERSON

vs.

THE QUICKSILVER MINING COMPANY, a
Corporation.

Clerk's Certificate to Judgment-roll.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court,
this 14th day of October, 1916.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

[Endorsed]: Filed October 14, 1916. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[43]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

No. 15,752.

C. P. ANDERSON,

Plaintiff,

vs.

THE QUICKSILVER MINING COMPANY,

Defendant.

Opinion.

BLEDSON, District Judge:

Insistent pressure of other matters awaiting my determination precludes anything but a brief resume of my conclusions in this case, although I have gone over the evidence submitted and the helpful briefs of able counsel with the care and consideration which the importance of the controversy seems to require.

Under the admissions of defendant's counsel made in court during the progress of the hearing, the only question in the case is as to the liability of the defendant upon the claim for compensation advanced by plaintiff. No evidence was tendered upon the issue as to the value of the services rendered, and counsel for defendant very properly indicated that the only question to be tried was the one of the authority of defendant's president to employ plaintiff and defendant's obligation to compensate him for the services rendered in response to such employment.

Very briefly, the controlling facts as they appeal to me are that, the defendant at the time of the trans-

actions in controversy was, and for more than forty years had been, conducting the operation of its quicksilver mines in Santa Clara County, by means, presumably, of agents and general managers, sent out from, and reporting to, the head office, which was always maintained in the city of New York. During that period, and in fact during all of the time under which plaintiff alleges he was [44] being employed by defendant's president, many thousands of dollars annually were being expended in the prosecution of the business of the corporation, including the mining of quicksilver, the carrying on of a general store, the selling of parcels of its immense property, and the doing of all things which seemed to be necessary or incidental to the consummation of the work in hand. The head offices of the company were in New York, more than three thousand miles away from this the only property which the company owned. At that property, and apparently having general charge of all its activities, was the president of the corporation, Nones, who seemed to be the chief directive head and force of the corporation, and who was assisted and aided at all times, apparently, by Tatham, the treasurer and general manager of the company, and likewise a director along with President Nones, who acted at all times under the direction of, but in sympathy with, the president and apparently supreme directive head.

There is no doubt but that plaintiff was employed by Nones, the apparent supreme directive head of the destinies of the corporation, to perform certain services for and in behalf of the corporation; neither is

there any doubt but that such employment was had with the knowledge, acquiescence and active participation in all things attending it of Tatham, Nones, treasurer, general manager and codirector. It may be, and probably is, true, although the proof is not entirely clear upon that point, that, the employment of the plaintiff for the purposes indicated by Nones, and for which compensation is sought in this proceeding, was without direct and precise authority emanating from the Board of Directors, and perhaps without knowledge upon their part as to such employment or its consequences. Be that as it may, however, plaintiff as a reasonable man, using reasonable diligence and discretion in the consideration of matters required by him to be [45] determined, was in no wise apprised of this fact, if it be the fact. Under all the circumstances, considering the general course of the business of the corporation, considering the long distance from the head office to where the property was situated, considering the fact that two directors of the corporation were upon the ground, and that they were actively co-operating in the doing of all things which served to render the defendant liable to plaintiff as for compensation for services rendered, and considering the fact that these two men, Nones and Tatham, either together or singly, were apparently clothed by the corporation, more than three thousand miles away, with the control of the destinies and activities of the property belonging to the corporation, there is small wonder, to my mind, that upon plaintiff being approached by Nones to secure certain options upon land having to do with water

rights situate upon defendant's property, and to secure certain other rights of way between the mining property and the nearest large community whereon a railway might be constructed whereby the property of the defendant would be directly benefited and whereby the products of its mining operations might be much more economically conveyed to market, plaintiff should have considered and been justified in considering that ample authority for his employment was lodged in the directive head then upon the ground. As was said by the Supreme Court of Nebraska in *Johnson vs. Milwaukee etc. Investment Company*, 64 N. W. 1100: "In this case the corporation was located in Milwaukee in the State of Wisconsin. It was formed for the purpose of doing business in Wyoming and most of its business was there conducted. The very fact that the corporation and its general officers held their office at a remote point was an element for consideration. *Rathbun vs. Snow*, 123 N. Y. 343. One might be justified in dealing with a person in apparent [46] management of the business in Wyoming, where the office of the corporation was in a distant State, where he would not be so justified if he found the general office and general officers at or near the place where the business was conducted." *A fortiori*, one might be justified in dealing with a person in apparent management of the business in California, assisted by another person a member of the Board of Directors and general manager of the corporation, where the office of the corporation was and had been for over forty years conducted and maintained in the city of New York.

It is Hornbook law, under the authorities, that an agency sufficient to meet all the requirements of this case might be created either expressly or ostensibly. Under the benign and just rules of the law, an actual agency is not less potent than an apparent one—one created by the negligence—want of ordinary care—of the principal. If the principal deliberately, or because of a want of due diligence upon its part, knowingly, or negligently permits its special agent to assume general powers or its general agent to assume powers in excess of the authority conferred, it will not be permitted in a court of justice successfully to maintain that it is not responsible for the acts done and performed by such agent in the furtherance of its business. A very fair statement of the rule, as I have gathered it from the books, is to be found in *St. Louis etc. Company vs. Wannamaker*, 90 S. W. 737, where it was said by the Supreme Court of Missouri that: “Apparent authority is such authority as a reasonably prudent man, using diligence and discretion, in view of the principal’s conduct, would actually suppose the agent to possess.” [47]

It is inconceivable to me how the plaintiff, with the knowledge of the facts above detailed, viewing the apparent paramount authority of Nones, president, director and directive head of defendant’s property, and considering it in relation to and with the equally apparent co-operation, acquiescence and participation of Tatham, the general manager, and another director of the corporation, would not be justified in arriving at the conclusion that they were possessed of all the authority necessary to employ him

for the purposes indicated. See *Dover v. Pittsburg Oil Company*, 143 Cal. 501; *Dickerson v. Colgrove*, 100 U. S. 580; *Southern Pacific Company v. City of Pomona*, 144 Cal. 339 p. 350; *Martin v. Webb*, 110 U. S. 7. The language of the Supreme Court of Colorado in *Witcher vs. Gibson*, 61 Pac. 192 is not inapposite. There the Court said, in substance that the principal is bound to keep himself advised as to the course of his business and to know whether his agent is using the specific authority which is granted to him, and if he is not, to advise the parties with whom he is dealing to no longer transact such business with him.

The claim is made and has been given careful consideration that the doctrine of *ultra vires* as applied to corporate activities is applicable here, and that it, in itself, will suffice to deny plaintiff a recovery. Assuming that the doctrine is applicable at all, still I am in thorough sympathy with the proposition that it has no efficacy in this case, because of the fact that the contract solemnly and deliberately entered into by defendant through its authorized agent, has been fully performed by the plaintiff on his part. It would now be in the highest degree unjust to permit defendant to reap the benefit of whatever advantages may have accrued from the performance of the contract by the plaintiff and then deny to the plaintiff the compensation agreed to be paid, because of the claim indulged in that the [48] corporation had no power to enter into the contract at all. This conclusion, I think, is sustained by the language and holding of the Supreme Court of the United States. Eastern

B. & L. Association vs. Williams, 189 U. S. 122.

I do not feel, however, that the doctrine of *ultra vires* is necessarily involved. Plaintiff was not employed to build or operate a railway or to build or operate a power or water plant. He was merely employed to secure options looking to the development of a water supply and water right already on the property of the defendant, and to secure rights of way by deed or otherwise for a railway, leading from defendant's property to the city of San Jose, and the operation of which, both as to carriage of freight and passengers, would presumably and probably directly aid and benefit defendant's property and defendant's business. New corporations were in fact organized, which said corporations were to conduct these respective businesses; but plaintiff was employed, and he rendered his services not in the organization or the conduct or control of such new corporations and new businesses, but in the taking of certain preliminary steps looking to the transaction of these new businesses when the proper and adequate machinery had been provided. In so far as the inceptive features were concerned, however, these preliminary steps had to be taken, and in my judgment were properly taken by the defendant itself, because of the fact that its property and its business was thereby to be benefited. Under the circumstances, therefore, the taking of these necessary preliminary steps was within the competency and the power of defendant corporation, and the plea of *ultra vires* is not sustained. *Brown vs. Winnisimmet*, 11 Allen, 326; *Fort Worth Civic Company vs. Smith Bridge Company*, 151 U. S. 294.

It follows from these considerations that plaintiff is entitled to the relief as prayed for and the appropriate [49] judgment will be entered to that effect.

[Endorsed]: Filed October 2d, 1916. Walter B. Maling, Clerk. [50]

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

No. 15,752.

C. P. ANDERSON,

Plaintiff,

vs.

THE QUICKSILVER MINING COMPANY, a
Corporation,

Defendant.

**Bill of Exceptions to be Used by Defendant in Any
Writ of Error Hereafter Allowed to the United
States Circuit Court of Appeals, for the Ninth
Circuit, to Review the Judgment Heretofore
Rendered Herein.**

BE IT REMEMBERED that on the 24th day of August, 1915, at the hour of ten o'clock A. M. of that day, at a stated term of the District Court of the United States, in and for the Northern District of California, the above-entitled case came on for trial before the Hon. Benjamin F. Bledsoe, District Judge, presiding, plaintiff being represented by B. A. Herrington, Esq., and the defendant being represented by A. H. Jarman, Esq. A jury having been waived, a trial was had before the Court.

Thereupon a statement on behalf of the plaintiff was made by Mr. Herrington, at the conclusion of which he offered in evidence the depositions of the witnesses in New York, taken upon motion of defendant, together with all exhibits. [51]

By stipulation in open Court between counsel the depositions were considered read. These depositions will follow the testimony of plaintiff's witnesses herein.

Testimony of C. P. Anderson, in His Own Behalf.

Mr. C. P. ANDERSON, the plaintiff, called as a witness in his own behalf, testified as follows:

I first met Charles A. Nones, the president of The Quicksilver Mining Company, in April, 1910, when Mr. Burnett, the attorney for the company, sent for me. At that time I knew that he was the president of The Quicksilver Mining Company. I also knew Mr. J. F. Tatham at that time. He was a director and was also general manager of the company's mining property at New Almaden, Santa Clara County, California.

At the first conversation in Mr. Burnett's office Mr. Nones said that the company had some work that they wanted done in regard to options on land and that Mr. Burnett would explain fully exactly what was required. Mr. Burnett then explained to me and showed me the section on the map (of Santa Clara County) that they would like to tie up in options. Mr. Nones asked me what I would charge them to get these options. I told him it was such a large job, it would be impossible for me to fix any price on it. He said it would be safe enough to leave

(Testimony of C. P. Anderson.)

it until after the work was done, that he would pay well for it and that there would be no trouble between us about agreeing as to the amount. He said he wanted me to go at it right away and I agreed to drop everything that I was doing and start on it. He said the purpose of getting these options was to secure control of the water in the canyon there for power purposes. I am [52] familiar with that country and have lived there for many years and I know every section of the country and am well acquainted with the people in the neighborhood.

Prior to this conversation with Mr. Nones I was in the real estate and insurance business between four and five years and was familiar with land values in that section. Nones did not want anyone to know the purpose of the options until the deal had been consummated.

I made two trips up there and spent a couple of days and looked over the territory and finally concluded that a great deal of that territory, which is very rough and steep, while it was owned by quite a number of individuals, it would not hardly be necessary to have that tied up. After this conversation with Mr. Burnett we went to an abstract company and showed them on the map what was required and they made a map covering about sixteen sections; I would not quite be sure about the number of sections, but it is somewhere in that neighborhood. My instructions at that time were to try and get everything on that map tied up in options, to obtain options on all the property. This land lies about thirteen

(Testimony of C. P. Anderson.)

miles south of San Jose, about a mile south of the Quicksilver Mining Company's property. The first two miles are in the bottom of a canyon which is quite open; the creek then branches off into two canyons. The canyons get very steep and rough. This is the watershed of Los Alamedas Creek, more commonly called Alamaden Creek. Mr. Nones' idea was to go clear to the headwaters of those two streams but upon examination I explained to him that it would be almost an impossibility to tie up that amount of land in options, that it would take too long to do it, and I would not be able to get options long enough to hold. [53] I advised that the land here at the junction of those two creeks and the land between the Quicksilver Mining Company's property on the forks of the creek,—that options be obtained on that. After I had been working on it for perhaps a couple of weeks Mr. Nones said, "I think you are right, we will have to get the junction of those two forks. You will have to go to work immediately and try to get that and also tie up the two ranches between the forks of the creek and the southerly line of The Quicksilver Mining Company's property."

To secure the options upon these properties I wired to a man by the name of Miller, who lived at Randsburg, Kern County, who owned 311 acres. I tied that up for the sum of \$5,000 for twenty days. I did that by wire. I then obtained an option on a fraction over 1100 acres from John B. Lawlor and Tom Lawlor for \$12,000. Mr. Cannon owned 771 acres immediately south of The Quicksilver Mining Company.

(Testimony of C. P. Anderson.)

I obtained an option from him for \$11,500. Mr. Nones was in San Jose when I obtained the Miller option but I believe had left before I got them all procured. The Cannon option was for sixty days and the Lawlor option was for somewhat less, I do not recall now. I notified Mr. Nones that I had these options. Mr. Burnett knew everything as I consulted with him continually as I went along with the work. The option expired. The general manager and myself, and even Mr. Burnett, wired Mr. Nones that the options were about to expire. Nones finally instructed Mr. Tatham to put up a deposit of \$500; \$250 to apply on the Miller option and \$250 on the Lawlor. I notified the people that I had a deposit of \$250. The Lawlor people were very antagonistic at the time. [54] I wired Miller that I obtained a deposit of \$250 and that I supposed it carried with it a commission. Mr. Nones instructed me to get the options any way that I could, with a commission or without, that I was to be paid a straight amount for my salary. Sometimes it is easier to get an option carrying a commission with it than without, so I took them any way I could. Miller wrote me back that the price was \$5,000 and that was what he wanted. I received \$500 from Mr. Tatham and tendered it to Lawlor and Miller and they declined.

Subsequently, when Mr. Nones came out, in discussing the matter with Smith & Emory, who were attending to his work down here, that is, they were to survey the dam site and different things, he said that he had been informed that it was absolutely use-

(Testimony of C. P. Anderson.)

less to buy this land until it had been illustrated whether or not a dam site was possible. He said that after it was surveyed he would take the matter up again and go to it. I returned the \$500 to The Quicksilver Mining Company. My check for the \$500 was drawn directly to The Quicksilver Mining Company and cashed by it. Smith & Emory are mining engineers with offices in San Francisco.

The dam site was surveyed. In fact, the entire section of the country was surveyed, that is, as far as it would be covered with water when the dam was built. These maps were all worked out in detail and were at The Quicksilver Mining Company's offices.

Mr. JARMAN.—You mean The Quicksilver Mining Company's office at New Almaden?

A. At New Almaden.

Q. Not in New York?

A. No, at New Almaden.

After the maps and surveys were made nothing more was done by me. I was simply waiting until such time as Nones felt was the proper time to take up this land. I did not procure any options subsequent to this time from these people. [55]

When Mr. Nones arrived in San Jose on his next visit he stated that it was absolutely necessary for us to have the Miller property, 400 acres located on the northerly side of The Quicksilver Mining Company's property. He said: "You go down to Randsburg and try to make a trade with Miller for this 400 acres of land"; he said that he would give Miller his pick of a sufficient number of acres, fixed at a

(Testimony of C. P. Anderson.)

price of \$60 per acre, to make up the \$5,000; said that he absolutely had to have the land at the forks of the creek; he impressed it very strongly on my mind that it was necessary to do something with Miller. I went down to Randsburg and found that Miller was not anxious to sell. I had known him for a great many years. He would not entertain a trade so I told him that I felt reasonably certain that a deal could be made within sixty days at the original price of \$5,000. He finally consented to give me a new option. I felt that I could go back to San Jose and sell the land which Nones was willing to trade at \$60 an acre and with the money pay for the Miller land.

The second option on the Miller land was given on October 19, 1910. It is as follows:

“Randsburg, October 19, 1910.

This is to state that I have this day given C. P. Anderson & Co., of San Jose, an option on my land on Almaden Creek, which contains 311 acres or thereabouts, for the sum and price of five thousand (\$5,000) dollars, U. S. Gold Coin net to me, and said sale must be fully consummated on or before December 20, 1910. I will furnish abstract and give clear title thereto.

JOHN JAMES MILLER.” [56]

Mr. Nones was in New York again and he didn't forward any money to take up this option and it lapsed. No other option was procured by me for water purposes.

The Senonac Power Company, a corporation, was

(Testimony of C. P. Anderson.)

organized under and by virtue of the laws of the State of California on March 19, 1912.

Previous to this time there was a corporation organized by the name of California Power Company. The object of organizing the Senonac Power Company was to increase the capitalization. I had nothing to do with the California Power Company.

The first time I took this matter up with Mr. Nones was at Mr. Burnett's office in the latter part of April, 1910.

Between April and October, 1910, nothing was done in regard to options except the obtaining of the Miller option the second time. In the mean time I looked up the rights of a ditch company and got the abstract. It was the Pioneer Ditch Company. They had some rights on the creek between San Jose and The Quicksilver Mining Company's property.

Between the lapsing of the last Miller option and March, 1912, these lands were surveyed. My best recollection is that it was surveyed in the spring of 1911. I went up along the creek with Mr. Nones when the surveyors were there.

I became a stockholder of the Senonac Power Company and an officer, to wit, secretary; one share of stock was issued to me which was immediately endorsed by me. I think there was a movement on foot to sell the water. I think that was the purpose of the organization. I could not remember now whether that was absolutely at that time or not, it is so long ago. [57]

Q. Was there any conversation by the president

(Testimony of C. P. Anderson.)

of The Quicksilver Mining Company, or the general manager, in San Jose, in regard to that matter?

A. I think Mr. Nones states that he had found out that the water was valuable and that the capacity of the old water company was not sufficient; he also stated—it was before the Public Utility Act went into effect—that he wanted to incorporate before that Act took effect, that was the object of incorporation at that time, to increase the capital stock and have it incorporated before the Public Utility Act took effect.

The general idea of the organization of this power company was in existence from the time I first started until it was organized. I consulted with Mr. Burnett continually; with Mr. Nones when he was here, and when he was not here, I consulted with Mr. Tatham, his representative.

Nones said that the stock of the Senonac Power Company was the property of The Quicksilver Mining Company.

Mr. HERRINGTON.—It will be admitted that the subscription to the stock shows that Charles A. Nones was a subscriber in the amount of \$11,700, being 117 shares. J. F. Tatham, \$100, the amount of one share; C. P. Anderson, \$100, the amount of one share. D. M. Burnett, \$100, the amount of one share.

It will be admitted that upon the 21st day of March, 1912, one share of stock was issued to Charles A. Nones. There is a cancellation endorsement upon it dated January 31, 1913, or 14. One share was

(Testimony of C. P. Anderson.)

issued to C. P. Anderson upon the 21st day of March, 1912; it appears to be endorsed in blank upon the back by C. P. Anderson. [58]

One share issued to J. F. Tatham upon the 21st day of March, 1912; it appears to be endorsed on the back in blank by J. F. Tatham.

One share issued to A. L. Brassy upon the 21st day of March, 1912, and endorsed in blank by Brassy.

One share issued to D. M. Burnett on the same day, endorsed in blank by D. M. Burnett.

4995 shares issued to The Quicksilver Mining Company, dated the 22d day of March, 1912.

One share issued to William H. Landers on the 31st day of January, 1914; it bears no endorsement.

Another share issued to The Quicksilver Mining Company on the 31st day of January, 1914; this bears no endorsement.

It will be admitted that the total number of shares provided for in the articles of incorporation is 5,000.

Mr. JARMAN.—I will put in the articles. Do you want them in now or later?

Mr. HERRINGTON.—You might as well put them in now if you want them in. We will offer in evidence the articles of incorporation of the Senonac Power Company of California. May they be considered read?

Mr. JARMAN.—The may be considered read.

(The document was here marked "Plaintiff's Exhibit 1.") A copy of which is hereto attached and so designated.

Mr. HERRINGTON.—I think it is admitted that

(Testimony of C. P. Anderson.)

of the 5,000 shares The Quicksilver Company owned 4,995.

Mr. JARMAN.—It is not admitted that they owned it, but it is admitted that a certificate was issued in the name of the company in March, 1912, for 4,995 shares. [59]

The Senonac Power Company was disincorporated. Mr. Landers, to whom a certificate of stock was issued in January, 1914, is the present manager of the Quicksilver Mining Company at New Almaden. The stock was issued to him for the purpose of disincorporating.

A deed was executed by The Quicksilver Mining Company to the Senonac Power Company with reference to rights of way for power. The deed was in the possession of Mr. Burnett, the attorney for the mining company.

Mr. HERRINGTON.—If your Honor please, I find upon consulting Mr. Jarman that the deeds we have referred to are not here in the courtroom. They may be produced, and I apprehend the court will continue this matter, if the case goes over, until the day after to-morrow.

The COURT.—Yes.

Mr. HERRINGTON.—I think possibly there is no dispute about the question of deeds, and that being the case it may not be necessary to produce them, but if they are required we can produce them later.

A. As I understand it, Mr. Anderson, your recollection of that deed is that it was a conveyance from The Quicksilver Mining Company to the Senonac

(Testimony of C. P. Anderson.)

Power Company of certain water rights and privileges possessed by the Quicksilver Mining Company?

A. Yes, sir.

Q. What became of those rights, so acquired by the Senonac Power Company, at the time of the dissolution of the corporation—the Senonac Power Company?

A. The deed went back to The Quicksilver Mining Company.

Q. Who executed that instrument?

A. It was executed by myself as secretary and Mr. A. L. Brassy, as vice-president. [60]

Q. And whatever rights were acquired by the Senonac Power Company from the Quicksilver Mining Company passed back to them at the time of the dissolution of the Senonac Power Company?

A. Yes, sir.

RAILROAD PROJECT.

In the spring of 1911 I took up with Mr. Nones the matter of a proposed railroad company. Mr. Nones first came to my office and stated that better transportation was absolutely necessary for the mines, that the company expected to put up a paying plant there, and that the ore would have to be more cheaply moved than it could be under the present system of hauling; he asked me how I thought the people living along the line between San Jose and New Almaden would entertain a proposition, that is, in the way of giving rights of way. I told him that I thought the people would be very glad to do something, that they were all interested in better trans-

(Testimony of C. P. Anderson.)

portation. So he said: "Tomorrow morning you go out and see as many as you can of the owners nearest to The Quicksilver Mining Company's property and arrange for a meeting." He asked me where would be the best place to meet and I told him I thought the school house would be the best place—the Pioneer School House. He says, "I am leaving for San Francisco now, if you make these arrangements by 12 o'clock to-morrow phone me at the Palace Hotel and I will come and attend the meeting." So I fixed the meeting for 8 o'clock that night. Mr. Nones told me to get a machine from Letcher's garage and meet him at the train in order to get him out there before 8 o'clock. The school house is about eight miles from San Jose on the main road [61] to the mine, commonly known as the New Almaden Mine.

To call this meeting I went out and interviewed possibly ten or a dozen owners of property in the vicinity and they agreed to be at the school house that night at 8 o'clock. I then returned to my office and called Mr. Nones at the Palace Hotel and told him of the meeting. I met him at the train and took him to the meeting. When we arrived there Mr. Nones sent the machine up to the mine to bring Mr. Tatham and he was present when the meeting was called. I introduced Mr. Nones and he said that The Quicksilver Mining Company needed better transportation and he supposed that the rest of them did and that he contemplated building an electric line and he said there would be no stock sold, that The

(Testimony of C. P. Anderson.)

Quicksilver Mining Company would pay for the building of the road, would take all the stock; but if there were any residents living along the line who wanted some of the stock they could have it. He intimated that it was not a stock selling proposition.

I suggested that it would be advisable to have a committee of the residents appointed to work in conjunction with me; that it would make the work easier and would facilitate matters. A committee of five was appointed to work with me to see what could be done along the line as to a right of way. Nones asked at that time that the committee try and produce a right of way free gratis from San Jose to New Almaden. We found afterwards that that was an impossibility; a great many people would rather donate money than give a right of way and have the cars running in front of the house. It took quite a lot of work to try and suit them all. Between San Jose and Almaden is a well defined public highway through a closely settled district, for the first six miles country homes with small orchards.

[62]

At a subsequent meeting the committee reported that we could obtain rights of way in some instances and in others could not as the people could not afford to give it. We figured on collecting money from other residents who would benefit from the road and using this money we might be able to secure a right of way.

Mr. Nones told me he depended entirely on me to

(Testimony of C. P. Anderson.)

produce the rights of way and where it was impossible to get them that franchises would take the place of them; that the Quicksilver Mining Company would pay me for my services, and he wanted me to be very particular about getting everything correct.

Before making the survey, myself and one or two of the committee canvassed the matter and discussed it with people living along the line. I finally made up my mind that a preliminary survey of the proposed line was necessary and told Mr. Nones so and he employed Mr. Herrmann, a civil engineer, residing in San Jose, to make it. The survey was made. A map was made of this proposed right of way. It runs from the southerly city limits of San Jose to the mine, a distance of about twelve miles. A branch line to what is known as the Senator shaft, in order to facilitate the shipment of ore, was contemplated. I had a petition drawn up to declare this road a county road and we afterwards obtained a franchise to run the proposed line over this road. The road ran along what is known as Almaden Road and we had to secure rights of way from every one until we struck the Almaden line. We ran on the side of the public road, 15 feet outside the road.

The witness here identified a map and a diagram marked "Diagram 1 for Identification" and "Diagram No. 2 for Identification," the originals of which are now on file with the clerk of [63] this court. By agreement of counsel same are not included in this Bill of Exceptions, as they are presently deemed

(Testimony of C. P. Anderson.)

unnecessary. Should they become relevant or necessary in any hearing on this Bill of Exceptions, it is agreed that they may be produced by either party and made a part of this bill.

Q. Just tell the Court what was done by you in regard to getting this right of way for the purpose of constructing this road.

A. The first meeting, I think, was held about the first of May. I worked continually until sometime in August. At the beginning of August we had a preliminary survey made. I think it took some two or three months to locate the line. I was working continually.

Q. That was May of what year?

A. May of 1911.

I went out with Mr. Herrman every day he was out. I knew the feeling of the people along the line and I had some idea about where the location might be made. He was working under my instructions all the time. There were very few changes made from the plan we had outlined.

Q. And how long were you working on this survey?

A. I should think about three weeks, two or three weeks.

The line, as surveyed, went through private property. I had options signed up on the property which ran for six months; before the six months expired the committee made a proposition to me to submit to Nones and Mr. Nones submitted a proposition to them, which was subsequently adopted. That is, he

(Testimony of C. P. Anderson.)

submitted a proposition to the citizens living in the neighborhood of the proposed right of way, which proposition was in writing, and is as follows: [64]

Letter, September 6, 1911, Nones to Schuman.

“New Almaden, Cal., Sept. 6, 1911.

H. Schuman, Esq.,

Chairman of Committee on Proposed Railroad
from San Jose to Hacienda,

My dear Sir:

Mr. C. P. Anderson has submitted to me the proposition of your Committee with regard to the building of the railroad from San Jose to Hacienda, and I take pleasure in submitting to you my proposition for the consideration of the Committee, namely:

That your committee obtain and collect the contemplated subscriptions, and accept all rights of way subject to the provisions hereinafter set forth;

That the commencement of the building of the railroad will not be later than December 6th, 1911, and the completion of the building of the railroad will be within fifteen months thereafter;

That the committee make such arrangements with me that upon the final completion of the building of the railroad they will deliver to me the cash collected upon subscriptions in a sum not less than forty-five hundred (\$4500.00) dollars and convey to me or my assigns the right of way that may have been gratuitously offered or donated; the said cash and the conveyances for the rights of way last mentioned shall be delivered to two trustees consisting of Mr. J. F. Tatham and another person to be selected by the

committee before the sixth day of December, 1911, to be held by such trustees and to be delivered by them to me or my assigns on the completion of the building of the railroad;

That I or my assigns will furnish the money requisite to [65] pay for the rights of way where present options call for money payment after the receipt by me or my representative of all public franchises for running on such parts of the public highway as may be applied for;

That when operated cars are to be run over said road at least three trips daily each way between the two terminals, and three more trips daily each way between the San Jose terminus and Downer Avenue, and that on all of such trips cars will stop on signal at all road crossings and lanes and at intervals of a quarter of a mile between such road crossings and lanes wherever that or a greater distance may exist between road crossings and lanes, provided that in addition to the foregoing the privilege will be reserved by the operators of the road of running through or local service in which cars may stop at fewer or not points between starting and the end of each trip;

That no time during which the building of said road is interrupted by strikes, mobs, the elements, public enemy, federal, state or county authority, or by any process of law or process or order of Court shall be deemed a part of the fifteen months above given for the completion of the building of said railroad, and that in case of any such interruptions for any such reason or by any such cause or causes, the

duration of such interruption shall be added to the said fifteen months at the termination thereof and shall be considered as a part of the time, together with such fifteen months from December 6th, 1911, in which the building of said railroad may be completed.

Sincerely,

CHARLES A. NONES." [66]

The offer of Nones was accepted by the committee. We took out the subscription list and got it signed by people living along the road and within a mile or two on either side. We must have gotten between eighty and one hundred subscribers. I was out all the time. My entire time was consumed on the railroad matter, all that time, in fact, all of the year 1911. The total amount of subscriptions secured was \$4,500. We collected a little over \$4,500, a couple of hundred was in notes. Mr. Tatham, referred to as trustee, was a director and manager of the mining company. The committee collected the \$4,500.

In the mean time Mr. Nones sent me \$2,000. By that time the San Jose and New Almaden Railway Company had been incorporated; J. F. Tatham was treasurer of the railroad company. I immediately check it over to the railroad company and the money was checked out for rights of way. Nones sent the \$2,000 from New York. \$650 was sent by Western Union and \$1,350 was wired to my bank and placed to my credit. I secured deeds and grants of rights of way from property owners along this proposed line. We went out and got them, taking a notary

along with us, and settled the matter then and there.

There was a great deal of negotiation leading up to the actual securing of the deeds. I did the negotiating in this regard and also had a lot of trouble to get a form of deed that would suit all. Finally the different attorneys agreed upon a form of deed and then we had no trouble in getting the rest of the people to accept it. These deeds provided that the property would revert to the original owner in the event that the railroad was not completed. Quite a number of the properties were mortgaged and it was necessary to secure partial releases in order to convey the proposed right of way. I got them. I imagine there were [67] between thirty and forty deeds for right of way which were procured. Mr. Nones finally told me not to procure any more property where we had to pay for it, to abandon that and get a franchise in place of it. Mr. Burnett and Mr. Herrmann attended to obtaining the franchise but I was with them all. The franchise was required over the Almaden road. The franchise was applied for in my name. When it was sold it was bought by the San Jose and Almaden Railroad Company, which had in the mean time been incorporated. There was also a second franchise secured for the branch line to the Senator shaft, which is located in the northwesterly part of the company's property and is where deep mining is done at the present time. In order to get this franchise for this branch line I got out a petition to the Board of Supervisors to have some property condemned and a public road declared. My ef-

forts were successful and a franchise was procured over it. A public road was declared on October 2, 1911. Mr. D. M. Burnett performed all the legal services in connection with these matters. He was the attorney for The Quicksilver Mining Company and handled all legal matters. Everything was submitted to Mr. Burnett and approved by him. Application for the franchises was handed to him. I spent a great deal of time consulting with Mr. Burnett and I went to him for instructions. He acted as president of the railroad company and I kept him posted with everything that was going on. I was a director and secretary of the railroad company; also secretary and director of the Senonac Power Company.

The railroad company was incorporated under the laws of the State of California on October 19, 1911. A copy of its Articles of Incorporation was introduced in evidence by plaintiff [68] and marked "Plaintiff's Exhibit 5," a copy of which is attached hereto, made a part hereof, and so designated.

Thereupon, counsel for plaintiff stated from the Articles of Incorporation that it appears that the capital stock is \$120,000; 1200 shares at \$100 per share. The original subscribers are:

C. P. Anderson	1 share
J. F. Tatham	1 share
D. M. Burnett	1 share
Charles A. Nones	117 shares

In this connection I suggest that we stipulate that the certificate book of the corporation, according to the stub, indicates that one share of stock was issued

(Testimony of C. P. Anderson.)

to C. P. Anderson on October 20, 1911, and that on the back of it is the blank endorsement of C. P. Anderson.

The same is true as to one certificate issued to D. M. Burnett and J. F. Tatham. Certificate No. 3, same date, purports to have been issued to Charles A. Nones for 117 shares, the original stock comes from the possession of the attorney for the defendant. The Quicksilver Mining Company, it bears no endorsement upon the back.

Mr. JARMAN.—I can not stipulate as to your last statement. These books were furnished us by Mr. Burnett, who was the attorney for that railroad company.

Mr. HERRINGTON.—It will be considered that they were furnished to Mr. Jarman by Mr. Burnett; Mr. Burnett is the attorney for the railroad company and also an attorney of record in this case for the defendant, The Quicksilver Mining Company. That is correct, is it not?

Mr. JARMAN.—That is correct. [69]

I was present at the incorporation of the railroad company. Mr. Nones was here at that time. I brought the papers down to the Palace Hotel and they were signed there before a notary. That the night before he was leaving for the east.

Q. Was there any conversation at any time between you and Mr. Nones or between Mr. Nones and anyone else in your presence as to who he was taking this stock for, the stock that was issued to him by the San Jose & Almaden Railroad Company?

Mr. JARMAN.—If your Honor please, I have not interposed an objection heretofore for the reason that the legal points to be raised in this case can be raised at the conclusion of the testimony and likewise raised in the defense which we have specially pleaded, but I desire now to interpose an objection to the form of this question in that Nones' declarations cannot bind this defendant; in other words, there must be something else in the record other than Nones' declarations in order to bind the defendant as to Nones' acts.

The COURT.—Yes, that would seem to be well taken; you can not prove an agency by the declarations of an agent, extra-judicial declarations.

Mr. HERRINGTON.—No, if your Honor please, but I take it that in conjunction with the testimony that has heretofore been presented in the deposition showing that \$3,000 of the Quicksilver Mining Company's money had been used for the purpose of promoting this corporation, and for the purpose of procuring rights of way, as appears from the minutes of the defendant corporation which are in evidence; and also the testimony of Nones himself, given in the deposition, that the company did own all of the stock of the San Jose [70] Railroad Company; and also the report of Nones, which is evidence as one of the exhibits attached to his deposition showing that this railroad was in contemplation and was to be constructed for the use and benefit of the defendant corporation, and the more important proven fact that he was the president of the corporation, in other words,

their acquiescence, their holding out and their accepting the benefits of this executed contract would permit him, although he is the president—not a declaration for the purpose of proving his agency, but for the purpose of proving what his corporation actually did, and for the purpose for which he was holding it, I think it would be competent for him to say for what he was holding that stock, or for whom he was holding it, and that it would be competent for him to say that he was a trustee in regard to that stock.

Mr. JARMAN.—That being your theory, then Mr. Anderson's testimony in that regard is objectionable upon the ground that it is hearsay. If Mr. Nones testified directly to that fact, it is sufficient in this case.

Mr. HERRINGTON.—It would not be hearsay, it already being proven that Mr. Nones is the agent of the mining company.

The COURT.—The keystone of your arch is, there being an agency proven—there is no doubt about there being an agency, the question is whether or not there was authority to do the things that are sought to be charged against the defendant. If that has been proven, then the act—and I apprehend this would be a part of the *res gestae* in so far as that goes, a declaration as a part of the conduct of the defendant acting within the scope of his authority, and of course it would be admissible against the principal. Whether or not that has been proven, I am not prepared to pass upon, because I do not know all of [71]

the proof. However, I apprehend that the vice which Mr. Jarman seeks to have eliminated, could be corrected by limiting the testimony merely to a declaration on the part of the agent if he be proven to have been the agent with the authority charged, as to the purpose for which the stock was taken in his own name, but for no other purpose. It is purely incidental, anyhow, I apprehend. There is no question about it, is there?

Mr. JARMAN.—We really do not know. We only know what Mr. Nones said about the matter. That is the truth of the matter, your Honor.

Mr. HERRINGTON.—You know he put up the money in the first instance?

Mr. JARMAN.—In order to give your Honor a little enlightenment as to the situation; at the time this money was being expended, and at the time that it was actually expended, the Board of Directors of The Quicksilver Mining Company and its stockholders knew nothing about either the power company or the railroad company; they did not know that one single dollar of its money had been paid out by its treasurer upon the order of its president for the purpose of organizing a railroad or a power corporation. Long after the money was paid out, the matter was presented to the Board of Directors by the president, after the thing had been done and the money was gone, and the Board of Directors ratified the expenditure of \$3,000 at that time, when, as a matter of fact, there had been over \$5,000 expended and

of which no report had been made. That is the situation, as the record will disclose, so far as the defendant is concerned. The ratification of the \$3,000 which had been expended and ratified, the ratification or the attempted ratification by the [72] Board of Directors was long after the money had been paid out. It was a condition that then confronted the Board of Directors, which they deemed best to dispose of in the easiest manner. The question of authority, as disclosed in the depositions which have been taken, and especially by the minute-book, no authority is shown whatever as ever having been vested in the president or any other officer or director of the corporation which in any way conferred any power to organize either of these corporations or to make any expenditure on behalf of these corporations; on the contrary, the last record—the first and only record, you might say in the meeting of the Board of Directors disclosed a violent objection on the part of the directors to *engaging* in any of these enterprises, and leaving the matter open with a suggestion that an engineer be employed to determine whether it was feasible or not. Now, I am not trying to argue the case or get into a conflict with counsel, but I am simply stating the situation at this time as disclosed by the record, so that your Honor can see the position assumed by defendant in this case; and so if I make any objections hereafter you Honor can appreciate the force of my objections. I will ask counsel if the question framed is limited to the matter indicated by your Honor, not

for the purpose of proving agency or authority, but simply for the purpose of proving a part of the *res gestae*. I have no objection to that. I do object to it being introduced in proof of alleged agency, or in proof of authority to do an act.

The COURT.—It would seem to me that your position is incontrovertible in that respect. Furthermore, if the agency or the authority within the agency, the authority to do the particular thing, using the word “agency” in the generic sense, is proven, it would be unnecessary, of course, for this declaration [73] to be admitted in order to prove any part of plaintiff’s case, because if the president of the corporation had authority to do these things, it is no concern of plaintiff or no concern of the corporation what he did with the stock. He might have given it away. The question is did he have authority to bind the corporation in the matter of organizing these corporations.

Mr. HERRINGTON.—That would be a matter for your Honor to determine after all the evidence is in. I think we can satisfy your Honor from the authorities that we have proven authority in so far as a want of any authority would permit the corporation to defeat the claim for services under an executed contract.

The COURT.—I understand the situation in that respect.

Mr. HERRINGTON.—There is a distinction there that the courts have drawn.

(Testimony of C. P. Anderson.)

The COURT.—Yes, and very properly so. I am rather inclined to think—I am not entirely free from doubt, but I am rather inclined to think that this evidence is competent. If counsel have no objection to its admissibility within the limitation suggested by the Court, which is to the effect that it will be considered by the Court, only in the event that other evidence proves the existence of the agency as claimed by the plaintiff, it can be admitted. It cannot do any harm anyhow in that respect. The Court is not going to pay any attention to it. If the Court comes to the conclusion that this man had authority to bind the corporation, I don't care what became of the stock.

Mr. HERRINGTON.—I think your Honor is correct in that regard.

The COURT.—The objection will be overruled with that understanding. [74]

Mr. JARMAN.—I have no objection if it is limited to that. (Question re-read to witness.)

A. For the Quicksilver Mining Company.

After the incorporation of the railroad company one meeting was held, to wit, October 20, 1911. This was the meeting wherein the Board of Directors organized.

After the organization of the corporation practically all of the \$2,000, which I turned over to Mr. Tatham, was paid out by Mr. Tatham as secretary of the railroad company. It was paid for rights of way. Mr. Burnett, president of the company, knew very well we were trying to get these rights of way

(Testimony of C. P. Anderson.)

straightened up. The deeds were made out and submitted to him. \$1,200 was paid into the treasury as required by the laws of California.

Q. By whom and under what circumstances was that paid?

A. The money was furnished by The Quicksilver Mining Company.

Q. What became of that money?

A. They used enough of that money to pay for the second franchise and the balance was loaned to The Quicksilver Mining Company by the San Jose & Almaden Railroad.

The COURT.—I don't understand this. I thought you were talking about money paid into the State.

A. No. It was money necessary to be subscribed under the articles of incorporation. You had to have \$1,200 in cash paid into the treasury of the railroad company. Tatham was treasurer.

Q. What else, if anything, was done by you, Mr. Anderson, after the procuring of these rights of way and franchises and the organization of the corporation?

A. We were waiting for Mr. Nones or The Quicksilver Mining Company to furnish the money to go ahead and construct the road. I had nothing to do with letting any contracts or anything, [75] because there were never any let. All I had to do was to furnish the franchise and the rights of way. Several contractors were taken over the line and figures were obtained as to the cost of construction.

(Testimony of C. P. Anderson.)

Q. The only services you were to render were to procure the rights of way and the franchises?

A. The rights of way and the franchises.

Q. What did you accomplish in that regard as between the City of San Jose and the terminal of the railroad?

A. The entire line was completed so far as the rights of way and franchises were concerned. They were ready for construction to begin at any moment.

Subsequent to the completion of my work, or about the time of the substantial completion of it, Nones returned to California. He was here during March of 1912 and spent quite a long time here, a couple of months or perhaps longer.

Q. Did you take up the matter of your compensation with him?

A. He took it up with me. He said that when we got up to Burnett's office, we were on our way over there then, that we would have an understanding as to the amount of money I was to be paid for the railroad; he said, "Something may happen to me." When we arrived there it was taken up. Mr. Burnett had another client that he had to attend to and he stepped out of his inner office into his outer room and I was handed a note there that was written by Tatham and signed by Mr. Nones for the sum of \$4,500 for work done on the Almaden and yet to be done. The second franchise at that time had not been obtained. The rest of the rights of way we had options and everything for and it had all been at-

(Testimony of C. P. Anderson.)

tended to. The work [76] was completed to a certain extent at that time. All work to be done by me not then completed I subsequently completed.

Q. He handed you this paper? Have you got that paper with you? A. Yes, sir.

At or about this time I had a conversation with Mr. Nones concerning my services rendered the Senonac Power Company. We discussed it before we went to Mr. Burnett's office, where I received this note in regard to the railroad. Nones said I had done a great deal of work on that and other things and he says: "It is expected that the water proposition will shortly be sold for quite a sum of money, and I will see that you are paid at least \$2,500 for your services on that." This sum was independent of my expenses in connection with these services.

Q. What, if any, conversation did you have as to who was to pay the moneys which you had outlaid in this matter?

A. The Quicksilver Mining Company.

Q. Were you ever paid anything by The Quicksilver Mining Company for any moneys that were outlaid by you?

A. I was paid \$60 expense money while I worked on the water options; it included my trip to Randsburg.

I paid out for expenses in connection with the railroad company \$411 which was agreed to by Nones, which amount has not been paid me. \$120 of that amount was laid out by me for one right of way.

Q. Have you the note you referred to?

(Testimony of C. P. Anderson.)

A. Yes, sir.

Q. The paper you have handed me is dated March 15, 1912, purporting to be signed by Charles A. Nones, and is the note you refer to? [77]

A. Yes, sir.

Mr. HERRINGTON.—We offer this in evidence. It reads:

Plaintiff's Exhibit 6—Letter, March 5, 1912, Nones to Anderson.

“New Almaden, Cal., March 5th, 1912.

“C. P. Anderson, Esq.,
San Jose, Cal.

Dear Sir:

For services rendered and to be rendered on the line of San Jose & Almaden R. R., I hereby agree to pay you the sum of forty-five hundred (\$4500) dollars, payable on completion of the road.

Yours truly,

CHARLES A. NONES.”

Q. Mr. Anderson, was there any statement or declaration made to you or to any one else, or made to you at that time, with reference to when this road would be completed?

A. Yes, there was a statement made by Mr. Nones at that time in Mr. Burnett's office that he had bought the rails, ties and fish plates and that the road would be completed in ninety days.

Q. Was there anything said to you by him as to when you would be reimbursed for the moneys you had laid out of our own pocket?

A. That was to be paid at once. He said he would

(Testimony of C. P. Anderson.)

pay it before he left at that time, that he would send me a check for it.

Q. Was there anything said to you at that time as to when you would be paid for the services rendered in connection with the Senonac Power Company?

A. At the sale of the water company, which he said would be before the road was completed, he said that the sale would [78] be made most any time.

I have never been paid for the work I did for the power company. Exhibit 6 was written in Mr. Burnett's office in San Jose by Mr. Tatham and signed by Mr. Nones and handed to me.

Mr HERRINGTON.—You may take the witness.

Cross-examination by Mr. JARMAN.

I first got acquainted with Mr. Nones in the spring of 1910. Prior to meeting Mr. Nones in April, 1910, I had been introduced to him by the manager of The Quicksilver Mining Company, Mr. First. Originally Mr. First asked me, before Mr. Nones ever came out west, to give him an idea from a real estate man's point of view what the land could be sold at, the farming land, and I made out an estimate of that and Mr. First sent it east. When Mr. Nones arrived I was introduced to him as the man who had made the estimate as to the value of the farming land.

Q. So that prior to meeting Mr. Nones in Mr. Burnett's office, you had some dealings with him with reference to the sale, or proposed sale, of the company's land?

A. Nothing but just simply gave him an estimate

(Testimony of C. P. Anderson.)

of what I thought the land would readily sell at.

Q. You discussed it with him?

A. No. He said that he had seen the estimate but that he would not know on that trip whether the land would be sold or not; he said, "I won't know anything about it until I come back to California another time."

Q. What did he say?

A. He said he didn't know whether the land would be sold [79] until he had made another trip to New York.

Q. Did he tell you why he would have to make another trip to New York? A. No.

Q. Didn't he tell you it would be necessary for him to put the matter up to the Board of Directors?

A. No, sir, he did not.

Q. Now, as a matter of fact, Mr. Anderson, you did sell considerable lands for The Quicksilver Mining Company, did you not? A. Yes, sir, I did.

Q. And received a commission for it?

A. Yes, partly.

Q. What is that?

A. In part, I received a commission.

Q. Well, you received a commission, no matter what size it was, on every sale you made?

A. I did.

Q. Before the deeds were passed, did you know whether or not they were authorized and ratified or approved by the Board of Directors of The Quicksilver Mining Company before they were delivered to the purchasers?

(Testimony of C. P. Anderson.)

A. Some of them were ratified afterwards. I was present when Nones and Mr. Burnett discussed the resolution that his Board had passed for the sale of some land, by which his Board instructed him to sell but not to convey; people objected that the word "convey" had not been mentioned in the resolution.

Q. That was merely a defect in the resolution which Mr. Burnett discussed and objected to, and it had to be passed again? A. Yes, sir. [80]

In October, 1910, I received \$1,000 as commissions on land sold to Clayton et al. In November I received a commission of \$325 for lands sold to Shuman and in February, 1911, another commission of \$75 for land sold to Shuman; and \$325 on land sold to Boles. In January, 1911, I received another commission of \$52.50 for lands sold.

Q. After making the sale, you followed it up and saw that the deeds were delivered to the purchaser and the money paid?

A. No, that was entirely up—I never had no deposit on these deals.

Q. But I say you followed it up and saw that the deal was consummated?

A. I was present when the deal was consummated.

Q. You followed the deal from the time you sold the land to the proposed purchaser until it was paid for, did you not? A. Yes, sir.

Q. And in following this deal it was brought to your attention that the resolution passed by the Board of Directors of The Quicksilver Mining Company, authorizing the execution of a deed, was in fact

(Testimony of C. P. Anderson.)

defective in a certain sense, and it was objected to by Mr. Burnett, and the Board of Directors had to pass another resolution with regard to that?

A. Yes, sir.

Q. So you knew that, before the deeds in each instance of land sold were executed and delivered, they were authorized by the Board of Directors of the defendant.

A. The man that bought the land, his attorney would not accept the deed in any other way.

Q. Well, you knew that at that time, in the year 1910? [81] A. Yes, sir.

Q. As I understand you, you met Mr. Nones in Mr. Burnett's office and Nones told you that The Quick-silver Mining Company wanted some options on lands for railroad purposes?

A. No, sir, for water purposes.

Q. And wanted you to go to work right away?

A. Yes, sir.

Q. And you started to work right away?

A. Yes, sir.

Q. Did you ask Mr. Nones at that time concerning his authority to authorize you to do this?

A. Why no.

Q. You didn't question it?

A. No, I didn't question it.

Q. You proceeded to do the things that he requested you to do? A. Yes, sir.

Q. And you continued to do anything that he requested along this line until your service was completed? A. Yes, sir.

(Testimony of C. P. Anderson.)

Q. In other words, so far as you are concerned, you never questioned his authority; is that right?

A. I did not.

I was friendly with Mr. Nones and was frequently with him while he was in California.

Q. So far as the work for the power company was concerned, did you ever have any authority or receive any authority from the Board of Directors of The Quicksilver Mining Company authorizing you to do any of this work? A. No, sir.

Q. Did you ever make any inquiry from the Board of Directors or from the secretary of the company whether Mr. Nones had any authority to do this?

A. I did not.

Q. You simply proceeded to do as he directed you to do? A. Yes, sir.

Q. Assuming that he had authority to employ you to do these things, now, is that true as to the service rendered by you as to the railroad company?

A. Sure. [82]

Q. You made no inquiry of the Board of Directors whether Mr. Nones had any authority?

A. No, I did not.

Q. You made no inquiry of the secretary whether any resolution had been passed authorizing Mr. Nones to instigate or commence the building of a railroad from San Jose to New Almaden?

A. No. I don't believe anyone else in San Jose ever questioned—

The COURT.—Well, you were not asked that.

Mr. JARMAN.—Q. So that, as I understand you,

(Testimony of C. P. Anderson.)

so far as you were concerned, the services which you performed and for which you now seek recovery so far as the defendant is concerned, all that you know about it is that Mr. Nones, who was the president of the corporation, requested you to do it and promises you would be paid? A. Yes, sir.

Mr. HERRINGTON.—Q. Mr. Jarman, by your question, when you say “all you know concerning it,” do you mean by that all the written information, all he knows concerning any authorization?

Mr. JARMAN.—Yes.

Q. Do you know, Mr. Anderson, of any other authority or any authorization whereby you should act as the representative of The Quicksilver Mining Company for looking up options, either for the power company or for the railroad company? A. No.

Q. All of your dealings were with Mr. Nones?

A. All of my dealings were with the president of The Quicksilver Mining Company and his attorney.

Q. With the president of The Quicksilver Mining Company? A. Yes, sir.

Q. You were never in New York? A. No.

Q. You never communicated with New York?

A. I wrote [83] several letters to Nones, addressed to The Quicksilver Mining Company's office.

Mr. HERRINGTON.—I think there is no question about the proposition, Mr. Jarman; it is conceded that his entire services were rendered on the instructions of Mr. Nones as president of The Quicksilver Mining Company, and we knew nothing about any

(Testimony of C. P. Anderson.)

authorization which Mr. Nones had as such president.

Mr. JARMAN.—Q. You knew that the principal office of The Quicksilver Mining Company and the place where its Board of Directors met was in the City of New York, did you not?

A. No, I did not.

Q. You didn't know that?

A. I did subsequently, after I got to work for him, yes.

Q. How long afterwards did you know that?

A. At the next annual election, I guess.

Q. About the time you were getting deeds for the sale of some of those lands?

A. About the June election in 1910. I have been paid nothing on account for my services rendered either enterprise. The \$60 expense money was paid me by Tatham in cash on Nones' instructions. I received \$2,000 from Nones by wire from New York. I turned all this money over to Mr. Tatham as it was received by me.

In reference to the power plant Nones instructed me to obtain options on that land outlined on the map which was made by the Abstract Company, according to Mr. Burnett's instructions.

Q. At the time that you first commenced your services for the railroad company had there been any report made by any [84] engineer on the construction of the railroad or the advisability or feasibility of such a road?

(Testimony of C. P. Anderson.)

A. You mean previous to the meeting which was held?

Q. Yes. A. No, sir, not that I know of.

Q. It all originated possibly with Mr. Nones, so far as you knew?

A. I knew nothing about the railroad at all until the time he came into my office and broached the subject and asked me what I thought of it and asked me whether rights of way could be obtained. That was the day before the meeting.

Q. After you came into the matter, you saw no reports of any engineers on the scheme of building this railroad? A. No.

Q. The only engineer you knew of in connection with it was Mr. Herrmann, who made the preliminary survey? A. Yes, sir.

Q. Did you know of any report being made by competent engineer prior to your commencing your services under Mr. Nones, or while you were so engaged?

A. No, sir, I do not. The options I obtained for the power plant lapsed. The Miller option was taken in the name of C. P. Anderson & Company. All options were taken that way. I did not receive any commissions for obtaining these options.

Q. Did you ever present a bill for these services, for which you now seek to recover, to The Quick-silver Mining Company? A. I did. [85].

Q. When?

(Testimony of C. P. Anderson.)

A. I presented a bill to Mr. Tatham on his last trip to New York during the encumbency of Nones as president. I took the matter up with Landers when he arrived here to take the management of the mine. He subsequently advised me to take up my claim with the New York office, which I did. The bill I sent to New York by Tatham was for \$4,500 and \$411 expenses.

Q. What was the bill you presented when Mr. Landers took charge of the mine? A. The same bill.

Mr. HERRINGTON.—(Addressing Mr. Jarman.) Have you the bill?

Mr. JARMAN.—We have the \$411 bill; we never heard of any other bill.

Mr. HERRINGTON.—We have a copy of it.

Mr. JARMAN.—Q. Have you a copy of the letter you sent to New York by Mr. Tatham?

A. Yes, sir.

Q. Will you produce it?

A. I don't know that it was sent to New York. I simply handed the bills to Mr. Tatham, who was treasurer of the company. He was on his way back to New York then.

Q. That was in the latter part of May, 1913, wasn't it? A. I believe it was around about May.

Q. That was the last trip that Mr. Tatham made to New York before he quit the employ of the company? A. So far as I know, yes, sir.

Q. Have you found the letter? A. Yes.

Q. The statement that you sent to The Quicksilver

(Testimony of C. P. Anderson.)

Mining Company, of which I have a copy, on your letterhead, is under date of May 19, 1913. This is the one you have reference to as having given to Mr. Tatham; is that right? A. Yes, sir. [86]

Q. You presented that to Mr. Tatham here in California? A. Yes, sir.

Q. And that is the first statement of any kind that you presented to the defendant for your services?

A. Oh, no, a statement had been rendered before for the \$411.

Q. To The Quicksilver Mining Company?

A. Sure.

Q. Was it rendered to The Quicksilver Mining Company or to the San Jose & Almaden Railroad Company?

A. Well, I don't know; it was a copy of the same thing that you have in your hand there.

Q. Who did you give it to—Mr. Anderson?

A. I sent it to the New York office.

Q. The New York office?

A. We discussed that right after Mr. Landers came here, and he repeatedly told me that he expected to have the \$411 very shortly for me.

Q. What I am getting at is, the first time you presented a claim to The Quicksilver Mining Company for your services, or for your expenses, was on May 19, 1913?

A. That was on the advice of Mr. Landers to take it up with the New York office.

Q. The first time you presented a bill for your ser-

(Testimony of C. P. Anderson.)

vices or for your expenses for which you now seek to recover, was on May 19, 1913?

A. That I sent to New York.

The COURT.—Was that the first time you presented a bill; you can answer that question, whether it was or not? A. No, it was not.

Mr. JARMAN.—Q. When was the first time?

A. The first time that the bill was presented was in the [87] latter end of October, 1912.

Q. This letter shows it was October 27, 1913: Is that the letter you mean? Aren't you mistaken in the year?

A. This is the bill I forwarded to the home office in New York upon the suggestion of Mr. Landers; but I had rendered a bill to Nones as to the expense money the year previous.

Q. Just as to the expense money?

A. The road had not been completed, the 90 days had not expired.

Q. When you sent the bill for \$411, how did you send it—did you send it to Charles A. Nones, in New York, or to the Quicksilver Mining Company?

A. I handed it to Mr. Nones; Mr. Nones and Mr. Tatham were together in San Jose.

Q. That was in October, 1912?

A. Yes, sir. He promised to give me a check for it the next day.

Q. Did you ever mail that statement, or a statement for your services to The Quicksilver Mining Company, 45 Broadway, New York City?

A. That is a copy of it, the letter you have there.

(Testimony of C. P. Anderson.)

Q. That was in May, 1913? A. Yes, sir.

Q. That was just a month before Mr. Nones quit?

A. No. This letter—I handed Mr. Tatham at that time a statement of the expense money and also the \$4,500, I guess.

Q. Yes, and \$4,500; that was on the 19th day of May, 1913? A. I handed it to him in my office.

Q. My question is this: Did you ever mail a bill for your services and the expenses which you seek to recover in this action to The Quicksilver Mining Company, 45 Broadway, New York City? A. I did, in 1913. [88]

Q. That is, in October, 1913?

A. Whatever the date of that letter is.

Q. That was after Mr. Nones had retired as president? A. Yes, sir.

Q. And after Mr. Tatham had quit? A. Yes, sir.

Q. And that was when Mr. Landers was in charge of the mine? A. Yes, sir.

Q. And that was the first time you had sent to the Quicksilver Mining Company, at its New York office? A. Yes, sir.

I have lived in San Jose and in the vicinity of defendant's mine for a great many years, and have been in the business since 1880.

Q. You testified on direct examination that the \$1,200 which was paid into the railroad company was furnished by The Quicksilver Mining Company? A. Yes, sir.

Q. How do you know it was furnished by The

(Testimony of C. P. Anderson.)

Quicksilver Mining Company?

A. Mr. Tatham brought the money, and he said it was the Quicksilver Mining Company's money.

Q. You base your testimony then that this \$1,200 was furnished by The Quicksilver Mining Company because Mr. Tatham paid the money to the railroad company? A. Well, I base it —

Q. Now, wait a minute: Answer my question.

A. Yes, sir.

Q. Do you know whether the Board of Directors of The Quicksilver Mining Company ever authorized or directed or instructed Mr. Tatham or Mr. Nones to pay this \$1,200 to the railroad company?

A. I do not.

Q. You know nothing about it? A. Nothing.

Q. All you know is the fact that the money was paid by [89] Mr. Tatham, who was the general manager and treasurer of The Quicksilver Mining Company? A. Yes, sir.

Mr. Burnett did all the legal work for the railroad company and the power company. I simply acted as one of the directors and signed the articles of incorporation and attended to meetings, and also acted as secretary. Mr. Burnett prepared the minutes.

My services, so far as the organization of the corporations were concerned, were about the same in each.

I signed the application to the Board of Supervisors for the franchise, which had been prepared by Mr. Burnett. I consulted several of the super-

(Testimony of C. P. Anderson.)

visors and went out with them through the district and showed them where the road would run.

Mr. Nones was in San Jose on March 5, 1912.

Q. How did he arrive at the figure \$4,500, how did he reach that amount?

A. He said he thought it was worth all the money that we collected along the line in the way of cash subscriptions, which was the sum of \$4,500.

Q. You and the committee had collected from owners along the proposed right of way the sum of \$4,500 in the nature of a subsidy? A. Yes, sir.

Q. And that was in the hands of the committee and was on deposit in the bank?

This sum was in the hands of the committee and was on deposit in the bank. This sum was to be paid to the railroad company if the railroad was completed within a certain length of time.

Q. And Mr. Nones had agreed with you that this was the sum of money that you should have for your services? A. An equal amount. [90]

Q. Didn't he tell you that when the road was completed you would get this \$4,500 that was in the bank?

A. He said I would get \$4,500; the money was not payable to me even upon the completion of the road.

Q. What did he say about taking the matter up with the Board of Directors, Mr. Anderson?

A. He didn't say anything; he never mentioned it. He never said that he was going to give me the \$4,500 that was in the bank.

Q. And it was just a coincidence that you were

(Testimony of C. P. Anderson.)

to get \$4,500 for your services; it was a mere coincidence that the amount you were to get coincided with the amount that was on deposit in the bank and was collected from the subscribers?

A. Well, I don't know; it is possible we fixed the amount — he said, "If it is satisfactory we will make it \$4,500, which will be the same amount that you have collected, you and the committee, and which will be turned over to us on the completion of the road." He said the road would be completed in 90 days; he said he had bought the rails.

Q. Prior to the incorporation of the railroad company, certain expenses had been created and moneys had been paid out in the way of investigations, had they not? A. Yes, sir.

Q. You know of that? A. I paid them out, that is, some of them.

Q. Was any money paid out by Mr. Tatham before the railroad company was incorporated?

A. Oh, the only money that went through the treasury of the San Jose & Almaden Railroad was this \$2,000.

Q. Who paid that money and where did it come from?

A. There was not any of it paid to me. I always was [91] told that The Quicksilver Mining Company paid certain bills.

Q. You were told that?

A. Well, I received no money myself from anything.

Q. I am not asking you about receiving any

(Testimony of C. P. Anderson.)

money; certain moneys were paid out; do you know of your own knowledge who paid that money?

A. No, I do not.

On March 5, 1912, I did not know that Nones contemplated retiring as president of The Quicksilver Mining Company, nor do I know anything about the meeting of the stockholders of that Company held on February 15, 1913.

I put in a couple of months of actual time on the water proposition when it started and devoted considerable time later on investigating other matters as directed.

I worked on the railroad proposition continually from the time of the first meeting in 1911, during all of the remainder of that year and one-half of my time in 1912.

The work could have been done sooner but the money was not forthcoming. There was always a delay about funds that kept the thing dragging. It took enough of my time to prevent me from doing much of anything else.

Mr. JARMAN.—Q. Mr. Anderson, did you ever hear of the matter of the construction of the railroad and the procuring of the rights of way, and grading, et cetera, being taken up by the board of directors of the Quicksilver Mining Company in New York? A. No, I never heard about that.

Q. You never heard about that? A. No.

Q. Did you ever know about the resolution approving the payment of \$3,000?

A. The first time I knew of it was when [92]

(Testimony of C. P. Anderson.)

the depositions were filed here in this court and I met you and Mr. Herrington here at the time the case was first set for trial, last April.

Q. Did you ever know in 1911 or 1912 about the proposal of one of the directors to employ an engineer to look the matter over before the board of directors took action? A. No, sir, I did not.

Q. You never knew anything about that?

A. No, I never heard of that.

Redirect Examination.

In obtaining the franchise a \$5,000 bond was required and was furnished by me, with my friends as sureties. One of the water options I secured provided for a commission, the other did not.

Q. Did Mr. Nones know of the fact that this provided for a commission?

A. Why, sure. I rendered a report to him stating what was gross and what was net.

Q. You have a copy of that report here, have you?

A. Yes, sir.

The COURT.—Let me see a copy of that report.

The WITNESS.—Yes, your Honor.

The COURT.—This report is addressed to Mr. Nones as an individual. Why didn't you address it to him as president of the Quicksilver Mining Company?

A. There was no particular reason. It never occurred to me.

I produced purchasers for the lands sold for which commissions were paid me at the usual rate.

In the railroad matter I attended not less than

(Testimony of C. P. Anderson.)

twenty meetings of the property owners along the right of way. There were about 80 or 100 subscribers to the fund that was raised. It was [93] necessary to interview them several times. I did most of the work and possibly interviewed all of the subscribers. These people were scattered along the road between San Jose and New Almaden. Some twenty rights of way were secured. I also obtained a petition to have a private road declared a public highway and obtained some fifteen signatures. I advanced \$150, which was immediately repaid me by The Quicksilver Mining Company.

I was intimately acquainted with most of the people living along the right of way and also made a trip to San Francisco to interview the railroad commission with reference to what was necessary as to filing maps.

I was constantly in consultation with Nones while he was here, Mr. Burnett the attorney and Mr. Herrmann the engineer, as to matters relevant to the business in which I was engaged.

Recross-examination.

The \$150 which I advanced was repaid me in cash by Mr. Tatham, who was also treasurer of the railroad company, who kept all the funds. I do not know whether the money paid belonged to the railroad company or the Quicksilver Mining Company; I do not think there were any funds in the railroad company at that time.

I knew of the negotiations leading up to the purchase of the property by Mr. Brassy. Mr. Burnett

(Testimony of C. P. Anderson.)

prepared the deed and forwarded it to New York for execution. I was at the bank when the deed was returned and the money paid over. I saw the deed. This transaction was about March 18, 1912.

I had no correspondence with Mr. Nones in reference to my claim against The Quicksilver Mining Company, except that I forwarded my expense bill for \$411 when I was rendering the report. [94]

Q. My question is, did you write any letters to either The Quicksilver Mining Company or to Mr. Nones in reference to the claim which you now make against the company, which is the subject of this action? A. No.

Q. You never wrote any letter to either one?

A. I subsequently did write to The Quicksilver Mining Company after Mr. Nones had severed his connection with the company.

Q. That was in October, 1913?

A. Possibly that was the date; I could not tell offhand.

Q. Did you receive any letters either from The Quicksilver Mining Company or Mr. Nones, with reference to the forty-five hundred dollar item for the services to the railroad company? A. No.

Q. Not from either one? A. No.

Nones severed his relations with the mining company at the annual meeting held in June, 1913. I did not know that there was trouble between the stockholders of the company and Nones, as president, until Mr. Landers came up to the mine for the

(Testimony of C. P. Anderson.)

purpose of experting it and examining the books in April, 1913.

I read an article in the San Francisco Chronicle about it; there was also an article in the San Jose Mercury. The article was printed in the San Francisco Chronicle on April 2, 1913, and was offered in evidence by counsel for plaintiff in error for the purpose of fixing the time when the matter of a controversy between Nones and the stockholders was definitely fixed as coming to the knowledge of the witness, and was marked Defendant's Exhibit "A." [95]

Further Redirect Examination.

It was conceded that the witness was not responsible in any way for any dispute between the stockholders of the mining company and its president, nor had he anything whatever to do with the affairs of the company in any shape, manner or form as to the election of Nones or sending him to California to represent the company.

Mr. Tatham repaid the \$150 to me at my office in San Jose.

Testimony of A. L. Brassy, for Plaintiff.

A. L. BRASSY, called as a witness for the plaintiff, testified as follows:

I am president of the firm of Brassy & Company. I know Charles A. Nones. I was vice-president and director of the Senonac Power Company. I had one share endorsed over. I had negotiations with The Quicksilver Mining Company with regard to the purchase of the lands belonging to the company.

(Testimony of A. L. Brassy.)

I negotiated with Mr. Nones and Mr. Tatham with the result that in March, 1912, I purchased about 92 and a fraction acres from the company.

Q. Were there any inducements given you by the president of The Quicksilver Mining Company to make that purchase? A. Yes.

Mr. HERRINGTON.—Q. Were they given to you in writing or orally? A. Both.

Q. I show you this instrument and ask you whether or not you recognize it, purporting to be signed by The Quicksilver Mining Company by Nones? A. I do.

Q. When you say these inducements were given to you in writing, is this the writing to which you refer? [96]

A. That is the writing to which I refer.

Mr. HERRINGTON.—We offer this in evidence, if your Honor please.

Mr. JARMAN.—We object, if your Honor please, upon the ground that it is immaterial, irrelevant and incompetent, no authority shown in Nones to execute any such writing.

The COURT.—Let me see it.

Mr. JARMAN.—And that so far as the record shows it is beyond his authority or power to execute.

The COURT.—What is the purpose of it, Mr. Herrington?

Mr. HERRINGTON.—The purpose is this, if your Honor please; it is contended by the deposition of Mr. Nones, that the construction of this railroad was his own private enterprise, until on cross-ex-

amination he was compelled to confess that the railroad *was, its construction* was contemplated as incidental to the operation of the mine and to the sale of land by the Quicksilver Company; this, if your Honor please, is a declaration of the Quicksilver Mining Company and of Nones. We will show, if your Honor please, after this sale was actually consummated, which fact was known to the defendant in this action, that at all times during all of the proceedings of the proposed construction of this railroad it was held out to the plaintiff that Nones had full power and authority to go ahead and procure his employment and secure his services, and that under those circumstances, as one theory, the plaintiff is entitled to recover; in other words, the defendant corporation permitted the people of the community [97] to believe that he had full power and authority to contract for the services of Mr. Anderson; that these facts were known to the plaintiff; now the defendant corporation held out the fact to the public that Mr. Nones had this authority; that is one theory.

The COURT.—Of course that is the question that we have to try, whether they did hold him out; if they did, you are no doubt entitled to a commission; if they did not another question is presented. The question is, can you prove they held him out; that has never been brought home to the corporation itself.

Mr. HERRINGTON.—We contend that we can prove those incidental matters which occurred in the regular transaction of the business of the corpora-

tion; by the testimony already in we have shown to the Court, by proof, that in his printed report to the corporation, the board of directors, he recites the fact that the rights of way for this railroad had been procured and all of the real estate belongs to the defendant The Quicksilver Mining Company, which printed report is here as an exhibit; we have also shown to the Court that the moneys of The Quicksilver Mining Company were the moneys that were forcing this enterprise, and we have also shown that at the stockholders' meeting it was voted that all of the acts of the officers be approved; we say that those things have sufficiently been brought home to the defendant corporation, that he was pursuing this course on this coast; we do not feel that the corporation is any more sacred than an individual, and if an individual living in New York City would permit a man to do as Mr. Nones did on this coast, he having absolute control, and all control of the business of [98] the defendant in this State, having represented the defendant from June, 1909, until June, 1913, over a period of four years, we are entitled, if your Honor please, to rely upon those representations.

The COURT.—No doubt. But you are now seeking by this offered evidence here, as I gather it, to show something done by Nones, which was brought to the attention of the plaintiff and presumably upon which the plaintiff himself relied, but you do not in your offer seek to bring it home to the corporation. If the things that you have suggested are true and if the legal conclusions follow from your state-

ment then you do not need anything of this sort; if they are not true this is not competent as against the defendant. I do not see how you are going to get away from the situation. If there was an agency established, ostensible agency due to things upon which the plaintiff relied as between the defendant corporation and its president, that is all you need; you do not need a reliance of the plaintiff upon anything else that may have transpired between the corporation and a third person, or between Nones the president and a third person; it would be immaterial to this controversy. If such agency was not established then you could not establish it by showing something that transpired between the president of this corporation and a third person upon which even the plaintiff did rely unless you bring it home to the corporation and establish in some way it was cognizant of that fact, or through its negligence in permitting the acts to be done it was responsible therefor.

Mr. HERRINGTON.—I think you are correct, and I have no hesitancy in saying to your Honor that we will contend that the [99] president of the corporation receiving notice, that is notice to the corporation; no other person so close to a corporation can receive a notice than the president himself, and unless it can be shown that—

The COURT.—If that be true whatever the president does binds the corporation; that is the logic of that.

Mr. HERRINGTON.—Whatever the president

does, if your Honor please, along the general lines—

The COURT.—If the president did receive notice, if notice to the president is notice to the corporation, then anything that is done and is brought home to the corporation, that binds the corporation; that is the logic of that; I doubt that.

Mr. HERRINGTON.—I do not go that far.

The COURT.—But that is the logic of your suggestion.

Mr. HERRINGTON.—I do not go that far. It is the law if there is notice to be served on the corporation it may be served upon the president, if there is a summons to be served on the corporation it may be served on the president, and that is sufficient service and all that is required. Now then, in discussing the general broad principles I say the corporation is no more sacred than an individual, and if the agent of an individual or a corporation is performing work or doing anything in the general line of the service, anything that he does, the corporation will take notice of; if he is doing something that is *ultra vires*, if your Honor please, I concede that he could be estopped by the corporation or a stockholder or an action in *quo warranto* could be instituted against him by the Attorney General; but that would not bar a recovery upon an executed contract for [100] service under employment by the president.

The COURT.—I cannot escape, Mr. Herrington though, the conclusion that if you were entitled to prove acts of the president upon which the plaintiff relied as showing an ostensible agency in the presi-

(Testimony of A. L. Brassy.)

dent, and merely prove that because he was president, because the knowledge of such acts might be brought home to him, and in that way brought home to the corporation, then your whole case rests upon the proposition that the corporation is bound by the acts of the president; that has got to be the result. If the corporation is not bound by the acts of the president and if there must be something brought home to the governing body of the corporation, to wit, the Board of Directors, then I am inclined to think the evidence is incompetent.

Mr. HERRINGTON.—Would your Honor permit me to introduce that for identification?

The COURT.—Of course, if there is any way—I gather from what you say that you are offering this bare proof as to what was done out here in San Jose with no intention to show that the corporation itself as such was in *any advised* of this transaction in so far as this particular paper was concerned.

Mr. HERRINGTON.—I don't know of any evidence that I could produce that will show that fact; I have no knowledge of any such testimony, that is, the fact that it was brought home; whether it was brought home or not I don't know. Just let me read this extract from 163 California:

(Thereupon counsel submitted authorities.)

The COURT.—The objection will be sustained as incompetent.

Q. Did you ever at any time have any conversation with Mr. Nones or did he ever at any time make any

(Testimony of A. L. Brassy.)

declarations to you in the [101] presence of Mr. Anderson prior to the month of March, 1912, as to condition of the railroad or whether any purchase had been made or not to establish the plant?

A. Yes.

Q. What was said by Mr. Nones in that regard?

Mr. JARMAN.—One moment—to which we object upon the ground that it is immaterial, irrelevant and incompetent and if they are offered as declarations of Nones as president of the defendant for the purpose of proving his authority or agency to act in reference to the matters inquired about, without an offer of testimony to charge the defendant or the Board of Directors, we submit it is not a proper way to prove his authority and therefore the objection should be sustained. May I inquire, is that question directed to the alleged testimony or pleadings in your complaint that Mr. Nones said that he bought rails and ties; is that what it refers to?

Mr. HERRINGTON.—Yes.

Mr. JARMAN.—What is the purpose or object; what do you limit the offer to?

Mr. HERRINGTON.—I do not limit to anything.

Mr. JARMAN.—What is its purpose; is it unlimited?

Mr. HERRINGTON.—Absolutely.

Mr. JARMAN.—Then it is offered probably to use for the purpose of proving authority or the extent of authority in Nones as president of the defendant, and to seek to use this evidence for the pur-

pose of binding the defendant, and we object to it as not a proper method of proving authority of Nones to act in the premises. I may call your Honor's attention to the fact that the plaintiff has introduced in evidence the deposition which we took of Mr. Nones, Mr. Swayne and Miss Bowe, and Mr. Nones testified directly that he never made [102] any such statements to anybody; now, they put on witnesses to contradict evidence which they have introduced in the first instance.

The COURT.—I do not see the materiality of statements whether he purchased rails or not; that does not add to the situation at all; if he employed this man and had the authority to do it, that ends it; whether he bought rails or not, that is immaterial.

Mr. HERRINGTON.—Upon one point it would be material, if your Honor please; your Honor will remember the note that was given Mr. Anderson when the road was completed. Mr. Anderson accepted it, but only accepted it with the belief—upon the representations, after the purchase of rails and those things had been made, which was false representations on the part of Nones, the president of the Quicksilver Mining Company to the plaintiff; it might be material to fix a time when this obligation became due.

The COURT.—The law would imply a reasonable time. The objection is sustained as incompetent, the same as the other.

Mr. HERRINGTON.—Upon the other proposi-

tion I would like to call your Honor's attention to the fact that the conversation that I seek to elicit was had after the defendant Quicksilver Mining Company had already put up this money for this preliminary work and after the Quicksilver Mining Company was the owner of this railroad, and it was the president of the Quicksilver Mining Company that was making these utterances about this subsidiary corporation which belonged at that time to the Quicksilver Mining Company.

The COURT.—How does that affect the situation?

Mr. JARMAN.—I think Mr. Herrington is confused in his dates [103] on that matter.

The COURT.—Whether he is or is not, I do not see how it helps the situation, assuming he is correct.

Mr. HERRINGTON.—The San Jose & New Almaden Railroad Company was incorporated on the 19th of October, 1911, and then became the property of the Quicksilver Mining Company.

Mr. JARMAN.—The Quicksilver Mining Company never knew of this railroad or had any interest in it until May 1, 1912, never heard of it.

Mr. HERRINGTON.—Oh, yes.

The COURT.—Even so, a statement of what he had done or was going to do, I do not see that that helps us in determining the amount of his authority in this case, the authority of this person; it stands on the same basis as the last offered evidence, incompetent and immaterial; the objection is sustained.

Mr. HERRINGTON.—This may considerably

(Testimony of J. F. Tatham.)

shorten it, if your Honor please, if I understand your Honor correctly, the only point in the case is the authority of the president.

The COURT.—That is the way it appeals to me, yes. No other contention that you make in the case is there, Mr. Jarman?

Mr. JARMAN.—None.

The COURT.—If the president had authority to employ this man, if he had authority to fix the amount of the compensation, the Court would conclude it would be bound by it.

Mr. HERRINGTON.—That will shorten the matter considerably.

The COURT.—That is my understanding as I view the case.

Mr. HERRINGTON.—As I understand Mr. Jarman, there is no further contention so far as he is concerned.

The COURT.—Yes. [104]

Testimony of J. F. Tatham, for Plaintiff.

J. F. TATHAM, called as a witness for the plaintiff, testified as follows:

I first became acquainted with Charles A. Nones in February, 1910. At that time I was bookkeeper and cashier for The Quicksilver Mining Company. After that time I was general manager of The Quicksilver Mining Company. Charles A. Nones, president of the company, appointed me and fixed my salary. I continued to act as such until June, 1913. My place of business was always in Santa Clara

(Testimony of J. F. Tatham.)

County. I took orders with reference to the operation of the property from Nones.

Q. Was he here or there where the properties are located, during any of the period of time from February to June, 1912?

A. Yes, on several occasions.

Q. Who had supervision and control of the property during that period?

A. Charles A. Nones, the president.

Q. Did he take orders from anyone? A. No.

Q. Were you an officer of The Quicksilver Mining Company? A. Yes.

Q. When?

A. I think I was elected in June, 1911; I am not sure.

Q. What were you?

A. Director and treasurer.

Q. How long did you continue as a director and treasurer? A. Until June, 1913.

I was vice-president and treasurer of the San Jose & Almaden Railroad Company. The stock of this railroad company belonged to The Quicksilver Mining Company.

About \$5,000 was expended for the promotion of the preliminary work of this railroad company. The money paid out [105] belonged to The Quicksilver Mining Company. I paid it out. A portion of it came from the office at New Almaden and a portion came from the New York office. \$3,000 I think came from New York and \$2,000 from the office at the mine. A little work was done cutting down a

(Testimony of J. F. Tatham.)

bluff to the entrance of the Hacienda. It was done by The Quicksilver Mining Company and paid for by it. Surveys were made and paid for by the Mining Company. Abstracts were also secured, amounting to \$225. The survey cost in the neighborhood of \$500. These bills were paid for by the mining company.

I am familiar with the organization of the Senonac power company. There was a proposition advanced to sell that property.

Q. Mr. Tatham, do you know whether or not there were any offers made to pledge the agricultural lands of The Quicksilver Mining Company for the purpose of raising funds to build this railroad?

Mr. JARMAN.—I object to that as immaterial, irrelevant and incompetent unless it relates to a pledging of the property by the defendant itself. What Mr. Tatham ever attempted to do is quite immaterial.

The COURT.—Yes, that is true, if it goes no further than what he attempted to do himself. Of course, it is difficult from the question to determine whether it is competent or not.

Mr. HERRINGTON.—We are not contending that there was any authorization of record for the purpose of giving Mr. Tatham or Mr. Nones authority or power to pledge the property.

The COURT.—What was actually done? [106]

Mr. HERRINGTON.—Q. What was done Mr. Tatham, if anything, with reference to negotiating a

(Testimony of J. F. Tatham.)

loan upon the property of The Quicksilver Mining Company?

A. Mr. Nones instructed me to go to San Francisco and see if I could get a loan on the property; I came to San Francisco and applied for it and got up the data on the railroad and brought it here, and applied for the loan, and negotiations were going on at that time when the water was brought into consideration and negotiations on the loan were stopped by Mr. Nones' order, when the sale of the water was practically consummated.

A deposit of \$1,000 was up on the sale of the water. The total purchase price was around \$325,000; the sale was being negotiated by Smith, Emory & Company. The sale was never consummated. The deposit was returned.

Q. During these transactions were there any negotiations with respect to the establishment of a paint plant? A. Yes.

Q. What were they?

Mr. JARMAN.—I cannot see that that is material in any way.

The COURT.—Of course, that is a very general question.

Mr. JARMAN.—Mr. Anderson makes no claim whatever for any services nor had anything to do with the alleged paint plant.

Mr. HERRINGTON.—I have stated the purpose of this testimony; if the Court holds it is immaterial, it goes to that one particular that I desire to show,

the essentiality of the railroad company in the profitable conduct of the business, the proper and profitable operation of this investment.

The COURT.—What do you mean by that?
[107]

Mr. HERRINGTON.—I mean, if your Honor please, that my purpose and object in offering this proof is to show that the railroad was necessary, the same as a logging railroad or any other railroad in a lumber camp would be essential for the purpose of bringing out lumber or logs where they could be marketed.

The COURT.—It is a matter of local history and general knowledge that this concern had been running for 40 years and taking quicksilver out of this property.

Mr. HERRINGTON.—It unquestionably used to be a very profitable quicksilver mine.

The COURT.—We do not know anything about the profits, but it had been running.

Mr. JARMAN.—Running a hundred years.

Mr. HERRINGTON.—Running a hundred years, but running at a loss, showing a big profit the last year, recently since the war—the quicksilver they are able to get out makes it profitable by using over the old dumps and old furnaces they had, and turning them over, but with millions of tons of refuse upon the dumps that could be made to bring hundreds of thousands of dollars, if your Honor please, which would have been utilized and the transportation of

(Testimony of J. F. Tatham.)

their other ores from new shafts which were seven miles away creates a new condition.

The COURT.—Well, that may be so, but this is very much different from what I supposed you had in mind; a corporation starting out to open a saw-mill, of course it would be understood that certain things were necessary, but the same conditions and the same necessities and the same presumptions would not arise if they had been running the sawmill [108] 40 years, as has been done in this case.

Mr. HERRINGTON.—If they cut all of the lumber within reach, and cut so far back, it becomes necessary to build.

The COURT.—Then it becomes a question whether they want to continue the business any further, and to what extent they want to incur additional expense in order to continue it; I do not see that there is anything that is of moment in this.

Mr. HERRINGTON.—I just want it in the record, so that there would be no question but what I made the point.

The COURT.—The facts that I have stated are true, aren't they? You understand me?

Mr. HERRINGTON.—Yes, the facts are that the mine has been running.

The COURT.—Running for a number of years?

Mr. HERRINGTON.—Running for a great many years.

The COURT.—And in so far as it may be running at all it is running yet without the railroad and without the water power.

(Testimony of J. F. Tatham.)

Mr. HERRINGTON.—Unquestionably that is correct.

The COURT.—That seems to me to dispose of the question of this necessity. The objection is sustained.

The water or power proposition consisted of a creek that had its source above the property of The Quicksilver Mining Company and which ran through the property about three miles in length. There was a section of a dam 122 feet high that could maintain a flow of approximately ten million gallons a day.

Some of the water from this creek was being utilized through a pipe-line by the county for road sprinkling. The pipe-line was approximately eleven miles in length. The county had an [109] option or a lease for fifty years with the right of the company to take it up at any time within twenty years.

Cross-examination.

The Quicksilver Mining Company gave the county a lease on the water. The county owned the pipe line and it gave The Quicksilver Mining Company an option to lease that pipe-line from the county at any time within 20 years.

I went to work for the Quicksilver Mining Company in September, 1905, as bookkeeper and cashier, and continued as such until February, 1910. I worked at New Almaden, Santa Clara County, California. Prior to going to work for the Mining Company I worked for the Edendale Fruit Company for two years; I bought fruit for them, kept books and

(Testimony of J. F. Tatham.)

was shipping clerk. Prior to working for this concern I was with the California Cured Fruit Association.

Q. Had you, prior to entering the employ of the defendant, ever been engaged in any mining business? A. No, I had not.

Mr. Feust preceded me as superintendent. His salary was \$250 a month. When I succeeded him my salary was \$175 a month. I was raised to \$200 and then to \$250 a month.

Q. You also testified that the stock of the Almaden Railroad Company belonged to The Quicksilver Mining Company? A. Yes, sir.

Q. How do you know that it belonged to The Quicksilver Mining Company?

A. When the stock was issued Mr. Nones, the president of the [110] Quicksilver Mining Company said that the stock that was issued to Nones was held in trust for The Quicksilver Mining Company.

Q. So that your knowledge of this fact that you have testified to, to wit, that this stock of this railroad belonged to The Quicksilver Mining Company was what was told you by Mr. Nones, the president of the company? A. Yes, sir.

I never attended a meeting of the Board of Directors of The Quicksilver Mining Company. As general superintendent and as treasurer I made annual reports to the company.

Q. Will you examine the depositions which counsel for plaintiff has offered in evidence? I ask you whether or not those are not the printed reports

(Testimony of J. F. Tatham.)

which you furnished to the Board of Directors at their annual meetings.

A. I furnished the rough draft and that was printed by the president.

After they were printed in New York, I saw copies of them. They were correctly printed. I never noticed or detected any discrepancies.

In the cash-book of The Quicksilver Mining Company, under date of September 1, 1911, appears an item, C. Herrmann, \$200; that was for surveying. I did not know what the services were.

Under date of October 17, 1911, appears an item of \$1,200 as money paid to J. F. Tatham, secretary and treasurer of the San Jose & Almaden Railroad Company; that represents ten per [111] cent of the paid up capital stock of the railroad company. The entry in the cash-book represents sums of money of The Quicksilver Mining Company which were paid out and the entry of \$1,200 referred to, was paid by me as treasurer of The Quicksilver Mining Company to myself as treasurer of the railroad company.

On the opposite page to this \$1,200 entry is a cross entry of \$1,050 against the \$1,200 entry, so that there was only \$150 actually used for the railroad; the cross entry represents the amount that was loaned back to The Quicksilver Mining Company by the railroad company. In other words, the payment of \$1,200 to the railroad company was a bookkeeping transaction with the exception of \$150. The \$1,050 loaned to the Quicksilver Mining Company was not paid back to the railroad company.

(Testimony of J. F. Tatham.)

Q. What authority had you for paying the funds of The Quicksilver Mining Company to yourself as treasurer of the railroad company?

A. The demand of Charles A. Nones, the president of The Quicksilver Mining Company.

Q. That is the only authority you had?

A. Yes, sir.

Q. Did you ever have any authorization from the Board of Directors of The Quicksilver Mining Company authorizing or empowering or directing you as its treasurer to pay any of its funds either to yourself as treasurer of the railroad company or to any creditor of the railroad company?

A. No, sir; no resolution of the board.

Q. To cut a long story short, you acted solely in all these matters upon the verbal order of Mr. Nones?

A. Verbal and written.

Q. Verbal and written; it might be a telegram or it might be [112] a letter. A. Yes, sir.

On page 137 of the cash-book under date of November 2d, 1911, appears an item of \$400; that was money paid out by me as treasurer of the mining company to the railroad company; on the opposite page appears an entry showing that the sum was repaid to the mining company on November 8th.

On December 27th, 1911, appears an item of \$50 charged to the railroad company; that was paid out the same as the other items upon the same authority.

On December 28th, 1911, page 141 of the cash-book, in the *résumé* at the end of the month's proceedings, appears a charge item to the railroad com-

(Testimony of J. F. Tatham.)

pany of \$2,073.24. That represented \$2,000 sent from New York to C. P. Anderson and charged to the railroad company and credited to New York funds.

On page 145 of the cash-book, under date of January 10, 1912, in a *résumé*, appears a charge "to close payroll \$152.16." In February, 1912, is a like charge of \$263.15; in March, 1912, is a like charge of \$793.75; in April, 1912, is a like charge of \$66.13; in June, 1912, is a like charge of \$150; in August, 1912, is a like charge of \$25; in September, 1912, is a like charge of \$160; in October, 1912, is a like charge of \$208.50; in December, 1912, is a like charge of \$280.20; these various amounts appearing on the books of the Mining Company were paid out by me as its treasurer under the direction of Mr. Nones.

Q. You spoke a moment ago of crediting New York funds with \$2,000; will you explain to the Court what you meant by that?

A. The New York office was always indebted to the New Almaden [113] office and when they remitted money to this office they were credited with that amount.

Q. They were credited to that amount?

A. Yes, sir.

Q. How was the charge to the New York office made up, what items went to make up that charge?

A. Remittances to to New York.

Q. Did it consist of any other items besides remittances?

A. When Mr. Nones was out here, if he drew any

(Testimony of J. F. Tatham.)

money it consisted of all money that he got.

Q. When Mr. Nones would come out here he would draw money? A. Yes, sir.

Q. That is, in various amounts? A. Yes, sir.

Q. Did he give you a receipt or a voucher for the money so drawn? A. No, sir.

Mr. HERRINGTON.—That is objected to upon the ground that it is entirely immaterial, irrelevant and incompetent, and it has nothing to do with the issues involved in this case.

Mr. JARMAN.—What we desire to show, if your Honor please, is something that is familiar to counsel and to the witness and to myself; it is that Mr. Tatham as the treasurer of the company paid out the corporation funds upon the say so of Mr. Nones absolutely; Mr. Nones would go into the safe and take out \$500, or \$1,000 or \$1,500 or \$1,800, and it would be charged to the New York office; there would be no entries made in the company's books and it would be put on a tag or on an envelope; at the end of the year Mr. Tatham would enter a lump sum, for instance, one year it was \$9,176 and some cents. Some weight seems to be attached by counsel to the fact that Mr. Anderson [114] was led into this matter somewhat by the fact that Mr. Tatham was a director of the defendant. Now, I have shown that Mr. Tatham never attended any meetings in New York. I desire now for the purpose of clearing up this matter of showing just the manner in which Mr. Nones handled the funds of The Quicksilver Mining Company; in other words, the treasurer of the com-

(Testimony of J. F. Tatham.)

pany not only paid its funds for the purpose of organizing other corporations for the purpose of exercising its corporate powers, but that the treasurer likewise used its corporate funds for any purpose that Nones directed him to use them.

The COURT.—Doubtless Mr. Herrington will stipulate that those were the facts.

Mr. HERRINGTON.—That may be true or may not; they have brought no cross-complaint against my client to recover the moneys that were claimed were irregularly paid out. I cannot see how we are interested in that matter.

The COURT.—It seems to me that it would be as helpful to you as it would be to them. That is the way it appears to me.

Mr. HERRINGTON.—I will stipulate that what you state is correct; I think it is the truth.

Mr. JARMAN.—Q. Mr. Tatham, were you ever advised of any action taken by the Board of Directors in reference to the railroad company?

A. No, sir, I was not.

Mr. JARMAN.—Q. Did you ever advise Mr. Anderson, the plaintiff in this case, as to any action taken by the Board of Directors in reference to either the power company or the railroad company?

A. No, sir, I did not. [115]

I came to San Francisco for the purpose of making application for a loan on the company's land holdings in Santa Clara County. I applied to the Western States Life Insurance Company for the loan. I do not know whether I made the applica-

(Testimony of J. F. Tatham.)

tion in the name of The Quicksilver Mining Company; Mr. Nones, the president of the company instructed me to attend to this business. That is the only authority I had.

Q. Did you ever make any report to the directors of the company about this application for a loan?

A. No, sir, I did not.

Mr. Anderson presented me with a claim for \$4,500 against The Quicksilver Mining Company in May, 1913, just before my last trip to New York. I took it to the company's office in New York and handed it to Mr. Nones.

I think that Anderson presented me with a bill for this amount before that time but nothing was ever done with it. I think it was presented shortly after that note became due. That is my recollection, I would not say for sure. I received it and placed it on file in the company's office in New Almaden.

Q. Why didn't you send it on to New York, or why didn't you pay it?

A. I didn't send it on to New York because I usually paid bills from this end. Of course, I would have consulted about that bill. But I did not pay it because I did not have the funds.

Q. Did you ever include that item or this bill, which you claim has been presented to you, in the statement of liabilities which the company owed?

Mr. HARRINGTON.—That would not be binding upon the plaintiff, [116] whether he did, or not.

(Testimony of J. F. Tatham.)

Mr. JARMAN.—I am not seeking to bind the plaintiff; I am examining this witness now.

The COURT.—Of course, it might be a circumstance of greater or less degree to absolve the defendant from actual knowledge; it may not be worth much. The objection is overruled.

A. That I cannot say. The records will show that, the books of the company.

Mr. JARMAN.—Q. Now, Mr. Tatham, don't you know as a fact that you never did?

A. I would not say absolutely one way or the other.

Q. Don't you recollect an item of \$411 for expenses? A. I recollect the item, yes.

Q. And you recollect that you included that item in the supposed liabilities of The Quicksilver Mining Company, did you not?

A. I could not say whether I included it, or whether I did not at that time.

Q. Do you recollect having a conversation with Mr. Landers and myself at the office of The Quicksilver Mining Company some time in the latter part of April or the first part of May, 1913, with reference to the outstanding accounts?

A. I know I met you there on two or three different occasions; I could not say the date.

Q. Upon these occasions you furnished us with a statement of the outstanding liabilities of The Quicksilver Mining Company, did you not?

A. They were in the bills payable book there.

Q. In the bills payable book? A. Yes, sir.

(Testimony of J. F. Tatham.)

Q. Do you recollect discussing the claim of Mr. Anderson and [117] telling us about the \$411 claim?

A. Not separately from the other accounts; no, sir.

Q. Do you remember saying anything to us about the claim that Mr. Anderson had against Mr. Nones for \$4,500? A. No, sir, I do not.

Q. What is that?

A. I don't remember saying such a thing, no, sir.

Q. Do you deny saying it?

A. No, sir, I don't deny saying it; I don't remember whether I did or not. I might have told you that the note which Mr. Nones gave Mr. Anderson was signed personally, or something to that effect.

Q. Do you recollect telling us that Mr. Anderson had a note or memorandum signed by Mr. Nones personally?

A. Well, I don't recollect saying it, no, sir.

Q. You don't remember that?

A. No, sir; I might have said it.

Q. When you received claims against the company, do you make any entries on the books or in the statements—when you were acting as the treasurer?

The Southern Pacific Company has a branch line to New Almaden with a terminal approximately 3 miles from the Hacienda. It is comparatively level from the production works to the railroad. This branch line has been there for a good many years and is still being operated.

Q. Do you know the capital stock of the defendant? A. Yes, sir.

(Testimony of J. F. Tatham.)

Q. Do you know that all the shares have been issued and outstanding?

A. Yes—I don't know absolutely, I have heard so. I never saw the books. [118]

Mr. JARMAN.—Mr. Herrington, will you stipulate that the capital stock of the company is 100,000 shares? It is a ten-million dollar corporation, and that all the stock is issued and outstanding. Any objection to stipulating to that?

Mr. HERRINGTON.—I don't know a thing about it, Mr. Jarman.

Mr. JARMAN.—That was proved in another matter. I know that to be a fact myself.

Mr. HERRINGTON.—I don't recollect of it ever having been proved to my knowledge before and I don't know anything about the capital stock or its issuance.

Mr. JARMAN.—The only reason I ask that is that I am the only witness in California who knows that fact, and I do not want to be sworn to testify to a fact. Mr. Nichol, the only other witness who knows it broke his hip at the Bohemian Club Jinks a short time ago and he is now in the hospital. I can verify that for you, Mr. Herrington.

Mr. HERRINGTON.—I am perfectly willing to so stipulate that you will testify and that Mr. Nichol will so testify, but the testimony is objected to upon the ground that it is immaterial.

The COURT.—What is the purpose of it?

Mr. JARMAN.—The purpose of it is in conjunction with the Minutes which have been introduced in

evidence here showing that all the stockholders were not represented at certain meetings and to show what was necessary for a quorum, as appearing on the face of the Minute Book introduced in evidence in this case.

The COURT.—Do you mean that there was not a quorum present at the meeting of the stockholders?
[119]

Mr. JARMAN.—At one meeting there was not a quorum present.

The COURT.—What difference would that make as against this plaintiff?

Mr. JARMAN.—Some mention was made there as to the alleged ratification of the acts. That is only incidental to the matter. The main point is this: a different rule of law prevails where an act which an officer of a corporation or a Board of Directors has no power to do under its charter and where all the stockholders do not assent to it; now, in this case if they attempt to bring themselves within that doctrine of ratification by the stockholders I want to show and the records do show that the acts of Mr. Nones in reference to this plaintiff, are in any event even if they were known by those who did ratify them, was not a ratification by all the stockholders of the corporation. That is the sole purpose.

The COURT.—Well, there may be something to that, I don't know; objection overruled. It is harmless anyhow.

Mr. JARMAN.—That is all.

(Testimony of J. F. Tatham.)

Redirect Examination.

The branch line of the Southern Pacific Railroad is about 4 miles from the Senator shaft. I think that the freight rate on quicksilver from Almaden Station to San Jose was eight cents a hundred. The freight rate from San Jose to San Francisco is seven cents per hundred, a distance of 50 miles. They ran trains over this branch line at various times. At one time it ran twice a week and then once a week. I think it is back to twice a week now, I am not certain though.
[120]

Recross-examination.

My testimony about the freight rate per hundred pounds was in reference to quicksilver in flasks. During the time when I was in the employ of the company they shipped about an average of 200 flasks a month. A flask contains 75 pounds of metal and the total weight of the flask and the quicksilver is 88 pounds.

Testimony of Emory E. Smith, for Plaintiff.

EMORY E. SMITH, called as a witness for the plaintiff, testified as follows:

I am a chemical engineer residing in San Francisco; a member of the firm of Smith, Emory & Company. I have been in business about 15 years. Our firm was called upon to examine the mineral material at what is known as the New Almaden Mine with reference to its adaptability to manufacturing metallic paint.

Q. What was the result of that chemical examination as to whether or not it was feasible to manu-

(Testimony of Emory E. Smith.)

facture such metallic paint?

Mr. JARMAN.—We object to the question as immaterial, irrelevant and incompetent.

The COURT.—What is the purpose of this?

Mr. HERRINGTON.—It is along the same line, if your Honor please, that I suggested some time back. Your Honor, I think, sustained the objection. It is for the purpose of showing that for the carrying out of the enterprise and utilizing the slag on this mining property it was essential to have a railroad.

The COURT.—The objection is sustained as immaterial. [121]

The COURT.—Is it for the purpose of showing that this was forwarded to the corporation and acted upon and brought home to the attention of the corporation in some way?

Mr. HERRINGTON.—No.

The COURT.—The objection is sustained as immaterial.

Mr. HERRINGTON.—Q. Did you or your firm make any surveys or maps or plans for a dam or dam site for The Quicksilver Mining Company upon any line of water or stream or creek there?

A. We did.

Q. Approximately when was that, as nearly as you can state?

A. 1912, I think, or 1913, or along about that time.

Q. Did your firm have anything to do with negotiating the sale of the water rights of The Quicksilver Mining Company?

Mr. JARMAN.—I object to that as immaterial,

irrelevant and incompetent; I cannot see the purpose of it.

The COURT.—I thought there was some testimony this morning with respect to a projected sale of the property there and which was never brought home to the corporation in any way at all.

Mr. HERRINGTON.—I cannot say that knowledge of the matter was brought home to the defendant.

The COURT.—I remember now that I came to the conclusion that it was immaterial and I am still inclined to adhere to that ruling. The objection is sustained.

Mr. HERRINGTON.—The corporation, however, had instructed that it be sold; that was done by resolution. You don't deny that, do you? This was simply carrying out the instructions of the corporation.

The COURT.—Let us understand about that; I didn't understand that. Is this in any wise connected with the plaintiff's services, this sale?

Mr. HERRINGTON.—Not this sale, no.

The COURT.—That is what I thought. It is entirely foreign to any claim made by the plaintiff in this case?

Mr. HERRINGTON.—Oh, yes, he had nothing to do with negotiating [122] the sale.

The COURT.—And did nothing pursuant to the resolution of the Board of Directors that the property be sold?

Mr. HERRINGTON.—No, nothing whatever.

Mr. HERRINGTON.—That is all.

Testimony of Charles Herrmann, for Plaintiff.

CHARLES HERRMANN, called as a witness for the plaintiff, testified as follows:

I am a surveyor and civil engineer and as such surveyed the right of way for the San Jose and Almaden Railroad Company. I was paid for my services by The Quicksilver Mining Company. The last payment was made to me on January 14, 1914, and amounted to \$407.50.

Cross-examination.

Mr. JARMAN.—Q. Will you tell the Court how you happened to come to get that last payment, who arranged it for you?

A. Mr. Jarman here is the man. If it had not been for Mr. Jarman I would not have got the money, I guess. I had been waiting a long time for my money and I could not get it and I threatened to sue the company.

Mr. JARMAN.—It will have to be explained, your Honor.

My bill for services for surveying for the railroad company was nearly \$1,000. I was paid by check signed by The Quicksilver Mining Company, delivered to me by Mr. Tatham. My testimony that I was paid by the Quicksilver Mining Company is based solely upon the fact that I received the check of The Quicksilver Mining Company in payment of my bill. I do not know whether the [123] company itself authorized the payment of the money that was paid to me.

The COURT.—Q. I understood you to say that the

(Testimony of Charles Herrmann.)

check you got in January, 1914, came from the New York office? A. It did.

Mr. JARMAN.—That is true.

The COURT.—Q. For what services was that check in payment?

A. The final payment for the survey of the railroad.

Q. When did you render those services for which this check was given in payment?

A. From August 7, 1911, up to January 13, 1913.

Q. This was the final payment, was it, for those services? A. It was the final payment.

Q. What did you receive all told?

A. Several payments, which I have here. I got a payment on account, the first payment on account, of \$200 on September 19th, I think it was, 1911.

Q. What was that for?

A. A payment on account.

Q. For services in surveying the line of railroad?

A. Yes, sir.

Q. Did your voucher show what the services were?

A. My agreement—

Q. (Intg.) Did the voucher you gave to the company show the services for which the payment was made?

A. I rendered the company my bill and they made me a payment on account.

Q. What did your bill state, what was on your bill?

A. My bill was so many days at \$20 a day, which was my agreement.

Q. For what?

(Testimony of Charles Herrmann.)

Q. For surveying and locating the railroad from San Jose to Almaden. [124]

Q. That is what your bill said? A. Yes, sir.

Q. Who did you give that to?

A. I gave that to Mr. Tatham or sent it by mail to Mr. Tatham.

Q. That was at San Jose; and you got your money from him? A. Yes, sir.

Q. A check made and signed by him?

A. By The Quicksilver Mining Company.

On March 22d, 1912, I received a check on account for \$292.50 on October 7, 1912, I received a check for \$72; on January 14, 1914, I received a check for \$407.50; that was all for railroad work.

I have been engaged in surveying in San Jose for many years and in my office have very complete records of the lands of Santa Clara County and of the lands owned by The Quicksilver Mining Company. I have done surveying of the company's lands at New Almaden.

Q. And there is more work to be done there now, or in the future, is there not, that you are aware of?

A. Yes, I expect so. [125]

The depositions of the witnesses, Alfred H. Swayne, C. F. Tracy, Charles A. Nones and Margaret Bowe, heretofore referred to, taken upon commission duly issued out of this court, introduced in evidence by plaintiff, together with such portions of the exhibits therein referred to as are relevant to this inquiry, are as follows:

Deposition of Alfred H. Swayne, for Defendant.

ALFRED H. SWAYNE, called as a witness on behalf of the defendant, and being duly sworn by the commissioner, testified as follows:

Direct Examination by Mr. HARBY.

I am a lawyer and broker; I am not now a director of the Quicksilver Mining Company; I resigned, I should think, a month or six weeks ago (a month or six weeks prior to January 19, 1915), and prior to that I was a director continuously from June, 1909. I was a director continuously from June, 1909, when I was elected, to the date of my resignation. I was elected a director at the same time Mr. Nones was made president of the company; I was in Europe at the time. He was president of the company during the time I was director down to June, 1913, continuously, and was a member of the Board of Directors throughout.

Q. Did you know Mr. C. P. Anderson, the plaintiff in this action? A. No.

Q. You have never seen him? A. No.

Q. Did you ever know of him?

A. Never heard of him until this case began. I have no recollection of his name being brought before the Board in any connection whatever while I was a member of the Board. I cannot remember any reference made to any dealings with him [126] while I was a director of the company; that is, no reference was made before the Board. I have no recollection of Mr. Anderson's name ever being mentioned before the Board of Directors while I was

(Deposition of Alfred H. Swayne.)

a member of it, or any question of his employment ever having been discussed. I have examined the minute-book of the company; the minutes were always read. Whenever a meeting was held, the minutes of the preceding meeting were read. In these minutes I did not see any of them that I recall as not expressing anything that was had at the meeting, or as failing to express whatever was had at the meeting.

Mr. HARBY.—I ask to have this book, purporting to be a minute-book of the Quicksilver Mining Company, marked for identification.

(The book just offered for identification was marked “Defendant’s Ex. 1 for identification, Jan. 19/15.”)

Q. I show you page 332 of Defendant’s Ex. 1 for identification, purporting to be one of the minute-books of The Quicksilver Mining Company, and call your attention to what purports to have been the annual meeting of the stockholders of The Quicksilver Mining Company held on June 21, 1911, and the paragraph thereof reading as follows: “The Chairman read the annual report of Mr. J. F. Tatham, Treasurer & General Manager, and also of the President, and on motion of Mr. Hollinger, seconded by Mr. Velso, all acts of the officers and directors of the Quicksilver Mining Company during the past year were ratified and confirmed.” Do you remember that resolution being passed? A. Yes.

Q. When that resolution was passed, were the acts of the officers and directors of the Quicksilver

(Deposition of Alfred H. Swayne.)

Mining Company brought to the attention of those present, or was the resolution [127] passed without their being brought to their attention?

A. My recollection is that the resolution was passed without their being brought to the attention of the stockholders.

Q. Was anything done other than to pass the resolution? A. Not that I remember.

Q. I show you page 350 of the same exhibit for identification where a record of the annual meeting of the stockholders of The Quicksilver Mining Company held on June 19, 1912, purports to be set forth, and call your attention to the following "The Chairman read the annual report of Mr. J. F. Tatham, treasurer and general manager, and also of the president; and on motion all acts of the officers and directors of The Quicksilver Mining Co. during the past year were ratified and confirmed," that paragraph appearing at the top of page 351. When that resolution was passed, you were, of course, present at the meeting? A. Yes.

Q. When that resolution was passed, was anything done other than to pass the resolution?

A. Not that I remember.

Q. Were the acts of the officers or directors of The Quicksilver Mining Company during the past year called to the attention of those present?

A. No.

Mr. HARBY.—I offer in evidence a printed book endorsed "Annual Report, Quicksilver Mining Company, 1909-1910."

(Deposition of Alfred H. Swayne.)

(The book just offered in evidence was marked "Defts. Ex. 2, Jany. 19/15.")

IT IS CONCEDED that this is the genuine report of the company covering the time stated.

Q. I show you what purports to be the printed annual report [128] of the company for the years 1910-1911, taken from the files of the company and produced by the present secretary; is that the report that was prepared and issued by the company (handing the same to the witness)?

A. I think it is.

Mr. HARBY.—I offer that in evidence.

(The book just offered in evidence was marked "Defts. Ex. 3, Jany. 19/15.")

Q. I show you also a printed report produced by the present secretary, endorsed "Report, The Quicksilver Mining Company, April 30th-Dec. 31st, 1911," and ask you if that is a report that was issued by the president of the company at the time stated (handing the same to the witness)? A. Yes.

Mr. HARBY.—I offer that in evidence.

(The book just offered in evidence was marked "Defts. Ex. 4, Jany. 19/15.")

Q. I show you also a printed book produced by the present secretary, endorsed "Annual Report, The Quicksilver Mining Company, 1912," and ask you if that is the annual report that was issued by the company, the first part being signed by Charles A. Nones as president, and part of it signed by J. F. Tatham as treasurer (handing the same to the witness)? A. Yes.

(Deposition of Alfred H. Swayne.)

Mr. HARBY.—I offer that in evidence.

(The book just offered in evidence was marked “Defts. Ex. 5, Jany. 19/15.”)

Q. Mr. Swayne, you were present at a meeting of stockholders of The Quicksilver Mining Company held at the office of the company, No. 45 Broadway, New York, on February 15, 1913, were you not?

A. Yes. [129]

Q. I show you a printed report of that meeting; have you heretofore examined that printed report (handing the same to the witness)?

A. Yes, I had a copy at the time.

Q. Is that an accurate report of the minutes of that meeting, purporting to have been taken by Willis Van Valkenburgh (handing the same to the witness)?

A. Yes, I think it is.

Cross-examination by Mr. MARSHALL.

I answered on direct examination that I had not heard of C. P. Anderson, the plaintiff in this suit, until this suit was instituted; that is true to the best of my recollection. The property of The Quicksilver Mining Company is located in California; at New Almaden, California, I believe. San Jose is the nearest city to where these properties are located, I believe; I have never visited the property.

Q. The furnaces and mining properties of the company are at New Almaden and the nearest shipping point is San Jose; is that correct?

A. Shipping point?

Q. The nearest railroad shipping point?

A. I don't understand so; I think there is a

(Deposition of Alfred H. Swayne.)

branch railroad near the works, a branch of the Southern Pacific somewhere near the works.

Q. Do you know anything about the water rights belonging to the defendant company?

A. Only what I have heard discussed from time to time among the directors.

Q. At board meetings?

A. Yes, I have never seen the property. [130]

Q. Did you ever hear discussed in a directors' meeting the proposition to construct an electric railway to extend from San Jose to New Almaden, where the works of the defendant company are located? A. Yes.

Q. You also heard discussed in directors' meetings the development of the water rights and water-powers owned by the company? A. Yes.

Q. And the object and purpose in the development of the company's water rights and power was to enable the company both to use its power to greater advantage and to sell power, wasn't it?

A. That was the plan.

Q. You knew that the project of an electric railway line to connect the works with the City of San Jose was a project initiated for the benefit of the defendant company, didn't you?

A. I knew that that plan was discussed; it was never authorized.

Q. Was it ever objected to? A. Yes, seriously.

Q. By whom?

A. By Mr. O'Brien, Mr. Stern and myself.

Q. Will you turn to the directors' minutes and

(Deposition of Alfred H. Swayne.)

show where such objection is written?

A. Yes, I will (referring to Ex. 1 for identification); on page 341 of the minute-book, Defendant's Ex. 1 for identification.

Q. Referring to page 346 of the minute-book, Defendant's Ex. 1 for identification, is it not the fact that the Board of Directors approved the action of the president of the company in this expenditure of some \$3,000 upon a right of way, surveys and cutting down grades for the San Jose and Almaden Railroad, the [131] stock of which was to be owned by The Quicksilver Mining Company; isn't that a fact? A. Yes.

Q. And at that meeting was there not a further resolution that the action of the president be approved in receiving the stock of the San Jose and Almaden road for the account of The Quicksilver Mining Company, the defendant in this action, for the full amount of expenses incurred? A. Yes.

I don't remember when the Almaden Stores Company was incorporated; it is all set out in the minute-book. I couldn't say of my own knowledge when it was incorporated; I have no knowledge. I would be able to determine only in general the date of incorporation of the Almaden Stores Company by reference to the minute-book; I have no personal knowledge of the incorporation of the Almaden Stores Company. I could not tell if I did turn to the minute-book whether it was the first mention of the company or not; I did not keep the minute-book.

(Deposition of Alfred H. Swayne.)

A. I cannot find that New Almaden Stores Company matter here.

Q. I notice on page 2 of the report of the president to the company dated May 14, 1912, that the president reported that the construction of a paint mill had been authorized by the directors with a capacity of 20 tons per day; that statement is in accordance with the facts, is it not? A. I believe so.

Q. On page 2 of the same report, being Defendant's Ex. 4, appears the following: "We were prevented from making a larger production for the eight months covered by this report on account of the lack of transportation facilities. This I expect to overcome, as this company has within the last few months obtained the necessary rights of way and franchises for an electric line, to be owned entirely by your company and which will extend from [132] San Jose to the town of New Almaden where the furnaces are located. By this means we will be able to save considerable cost in our transportation, and at the same time it will be possible for us to increase our hauling facilities, thereby also increasing our production. This proposed line will also transport passengers and express matter for the adjacent territory. Another benefit arising from construction of this line will be the opening up of our lands, most of which can be developed and sold at a far higher price than would be obtained were this road not in operation." That excerpt from the president's report is in accordance with the facts, is it not, as you understand them?

(Deposition of Alfred H. Swayne.)

A. That was read to the directors; I won't state it is in accordance with the facts.

It was submitted to the directors before it was submitted to the stockholders and it was submitted to the stockholders as a printed pamphlet on or about this date.

Q. Did you ever object to it to the stockholders or at the time as not being in accordance with the facts?

A. No, but the results of the reading of that report was the passage of that resolution authorizing the expenditure of \$3,000 for the full expense.

Q. But that resolution which you refer to in the minute-book was subsequent, was it not, to this report? A. What is the date of that report?

Q. May 14, 1912.

A. This resolution was passed as the result of the reading of that report to the directors and limiting the president to a total expenditure of \$3,000 for all expense connected with the items mentioned in that report. [133]

Q. When was the report printed?

A. I do not know; my recollection is that the printed report was submitted to the directors, but it may have been read in typewritten form and printed subsequently for distribution to the stockholders; I don't remember about that.

Q. How do you explain that the minutes which you say limit the expenditure to \$3,000 are minutes of a meeting of May 1st and the president's report which you say was read to the directors is dated May 14th?

(Deposition of Alfred H. Swayne.)

A. The president's report was finished subsequently for distribution to the stockholders, but was submitted to the directors, as I remember, at this meeting of May 1st.

As far as I know the report dated May 14th went forward to all the stockholders of the company.

Q. Did you send any explanation of any kind to them or did other directors of the company send any statement or notice of any kind to the stockholders that the report of May 14th did not accord with the facts?

A. No, I still think it did accord with the facts. This resolution covers it and said \$3,000 is the total amount authorized for that purpose.

Q. Now, in that same report occurs the following: "I also beg to report that negotiations are now pending for the sale of the water rights belonging to this company, at a price that will give this company a large working capital for whatever future developments may be contemplated." Were such negotiations pending at the time of that report?

A. It was so stated in the directors' meeting; I do not know whether they were pending or not, of my own knowledge. [134]

Q. Do you know the name of the company with which negotiations were pending? A. No, sir.

Q. I call your attention to the minutes of a special meeting of the Board of Directors held on March 18, 1912, page 345 of the minute-book, as follows: "On motion of Mr. Swayne, duly seconded, the resolution adopted by the Board of Directors at a special meet-

(Deposition of Alfred H. Swayne.)

ing held at the Company's office, No. 45 Broadway, New York, on Sept. 20th, 1911, regarding the sale of the Company's water rights was rescinded at today's meeting, and on motion of Mr. Whicher, and seconded by Mr. Swayne, the following resolution was adopted in its place.

"Resolved that the officers of the Company be authorized to transfer to Senonac Power Company, all the water rights owned by the Quicksilver Mining Company, together with a lease of the pipes of the county of Santa Clara. Said lease being for a term of fifty (50) years, and in exchange therefore to receive all stock and other securities of the Senonac Power Company, and the President is therefore authorized to sell and transfer these securities at a price of not less than Two Hundred Thousand Dollars (\$200,000.00) in cash or its equivalent, reserving, however, to The Quicksilver Mining Company the right for all power to carry on its business now and in the future, and for not less than 200,000 gallons of water per day." Is that correct?

A. Yes.

Q. As I understand it, the transfer provided for in that resolution was never actually carried out?

A. I don't know about that; I think it was; that company was merely a subsidiary of The Quicksilver Mining Company; I believe it was organized and the transfer made and subsequently it was dissolved.

[135]

Q. Is there any question, Mr. Swayne, on your part of the authority of Mr. Nones to organize the

(Deposition of Alfred H. Swayne.)

Senonac Power Company now that you have read that resolution?

A. I prefer not to express an opinion on that point; the resolution speaks for itself.

Mr. MARSHALL.—Mr. Harby, will you produce the cash-book of the defendant company covering the fiscal year 1911 and 1912?

Mr. HARBY.—Counsel for the defendant replies that such book is in California and not in New York, probably at the company's works in New Almaden.

Redirect Examination by Mr. HARBY.

Q. Mr. Swayne, you were questioned with regard to a resolution appearing at page 341 of Defendant's Ex. 1, for identification, being the minute-book of The Quicksilver Mining Company, referring to an electric road, where it is reported that Mr. O'Brien stated that he knew a competent engineer who could furnish such report. Was this engineer referred to by Mr. O'Brien retained by the company? A. Not that I ever heard of.

Q. Did Mr. O'Brien resign after that?

A. Shortly after that, yes, sir.

Q. Was any reason stated by him before the board as to why he resigned?

A. Not before the board.

Q. You were also asked with reference to a resolution at page 346 of said Defendants Ex. 1 for identification, where it is reported that the president's action in ordering the sum of approximately \$3,000 to be charged to March expenses be approved, [136] said sum representing the amount of money

(Deposition of Alfred H. Swayne)

actually expended upon rights of way, surveys and cutting down grade for the proposed San Jose and Almaden Road; was ever any resolution passed at any time authorizing any additional sum to be expended upon rights of way, surveys and cutting down grades for any proposed road on behalf of The Quicksilver Mining Company?

A. No. I made a statement that I had never heard of Mr. Anderson; I find in looking over the minutes of the Company that his name had been mentioned in connection with the Stores Company, but I had never heard of him in connection with the electric railroad or water-power.

Deposition of Charles F. Tracy, for Defendant.

CHARLES F. TRACY, called as a witness on behalf of the defendant, and being duly sworn by the commissioner, testified as follows:

Direct Examination by Mr. HARBY.

I am the secretary of the defendant, The Quicksilver Mining Company. Defendant's Ex. 1 for identification is the minute-book of The Quicksilver Mining Company covering the period from November 12, 1890, to July 10, 1912. That book is one of the official records of The Quicksilver Mining Company, in my possession, and I have produced it from the office of the Company. I have also produced the Charter and By-Laws (handed to the witness).

Mr. HARBY.—I offer it in evidence.

(The paper just shown the witness was marked Defts. Ex. 6, Jan. 19/15.") [137]

(Testimony of Charles F. Tracy.)

Cross-examination by Mr. MARSHALL.

Q. Mr. Tracy, have you produced any of the financial books of the defendant corporation covering the past four years, preceding June, 1913?

A. I produced those statements.

Q. I am referring to the financial books of the corporation, not printed pamphlets circulated for the benefit of the stockholders.

A. I have produced no books.

Q. The period concerning which I am interested is from January 1, 1909, to May, 1912.

A. No, I have no books; Mr. Nones or Miss Bowe did not leave any books or any vouchers in the safe of The Quicksilver Mining Company.

Q. Do you know the present whereabouts of such books?

A. I do not; I wrote a letter to Miss Bowe demanding the vouchers and books, but never got any answer.

Q. Is that the only effort you made to obtain them?

A. Yes.

Deposition of Charles A. Nones, for Defendant.

CHARLES A. NONES, called as a witness on behalf of the defendant, and being duly sworn by the Commissioner, testified as follows:

Direct Examination by Mr. HARBY.

I think I was president of The Quicksilver Mining Company five years,—from June, 1909, to June, 1913. I reside in New York. I am able to identify the book which you have handed me—Ex. 1 for identification—as the minute-book covering the period in the book;

(Deposition of Charles A. Nones.)

it goes to 1912. It is [138] up to 1912; it is not up to 1913. I recognize it as the minute-book of the Company covering the period from the date appearing on the first page of the book up to 1912.

Mr. HARBY.—I offer it in evidence.

I know Mr. Anderson, the plaintiff in this action.

Q. Are you aware of the suit that he has commenced against The Quicksilver Mining Company?

A. I am not.

Q. I show you the copy of the complaint; will you read it (handing the same to the witness)?

A. I would like to (reading the same).

Q. You have read the complaint? A. I have.

Q. Before I take that up I want to show you the printed reports that have been produced here, marked Defendants' Exhibits 2, 3, 4 and 5, and ask if you recognize them as being what they purport to be (handing the same to the witness)? A. Yes.

Q. They were reports issued by you as president of the company? A. Yes.

Exhibit 6, which is shown me, purporting to be a copy of the Charter and By-Laws, produced from the office of the company has been changed, as you will find in the minute-book. There have been amendments. To the best of my knowledge and belief those by-laws are accurate as set forth in the pamphlet shown me, with the exception of the amendments appearing in the minute-book.

Q. Referring to this complaint, did you ask Mr. Anderson to organize a corporation for you?

A. Which corporation?

(Deposition of Charles A. Nones.)

Q. Any corporation, for you?

A. Not that I remember; no, sir.

Q. Did you ever ask him to organize any corporation at all? [139]

A. I don't think so.

Q. Did you ever ask Mr. Anderson to carry on the business of any corporation for you? A. No, sir.

Q. Did you ever ask him to carry on the business of any corporation anywhere? A. No, sir.

Q. Did you ask Mr. Anderson to secure options for the purchase of property for a railroad for you?

A. Yes.

Q. Did you ask him to secure options for the purchase of rights of way for you for a road?

A. I did.

Q. Did you ask him to secure options for the purchase of property and options for the purchase of water rights and rights of way for you?

A. Yes; for me personally, not for the company.

Q. Did Mr. Anderson accept this employment from you personally? A. Yes.

Q. Did you have any agreement with Mr. Anderson with respect to his compensation?

A. I gave Mr. Anderson a letter stating that he would be entitled to the sum of \$4,500 upon the completion of the railroad for the work which he had performed, and was about to perform, and that was signed by me personally.

Q. You did not give that to him on behalf of the company? A. I did not, sir; I was not authorized.

Q. Was any resolution of the Board of Directors

(Deposition of Charles A. Nones.)

of the company passed purporting to require you to employ Mr. Anderson for any purpose?

A. I am not quite sure, but I think you will find in the minutes authorizations to employ C. P. Anderson to sell some real estate; I believe you will find it in the minutes.

Q. Any real estate that had any connection with the railroad of water-power?

A. I don't think so, but I will not answer [140] positively.

Q. Whatever resolutions were passed by the Board of Directors authorizing you to employ Mr. Anderson are contained in the minute-book, Defendant's Ex. 1 for identification, are they not? A. Yes.

Q. Were there any resolutions of the Board of Directors authorizing you to employ him that are not contained in that minute-book? A. No, sir.

Q. Did you ever say to Mr. Anderson that compensation for his services rendered to The Quicksilver Mining Company should be fixed and determined at a period of time when the work to be done by him under the employment of the company was substantially completed?

A. I did not make any such statement.

Q. Did you ever write any such thing to him?

A. The letter which I have written and which I have given you the gist of was signed by me personally, and I would like to explain the cause of the letter and why it was written.

Q. Mr. Nones, you will please give the explanation you have in mind.

(Deposition of Charles A. Nones.)

A. Mr. Anderson purchased for the railroad company certain rights of way, and it is my belief that upon every right of way that he purchased he received a commission, paid by the railroad company for his services, but he was at some work and trouble in getting consents from property owners along the line. He received his expenses for these, and, in addition to these, received a cash bonus which was deposited in bank, to be paid over to the railroad upon its completion of \$4,500. This \$4,500 was a like amount of \$4,500 that I agreed to give Mr. Anderson personally, feeling sure that the Board of Directors, when I placed it before that Board, would sanction the payment to him [141] of \$4,500, but he had no obligation from the company.

Q. What bank was that \$4,500 deposited in?

A. I think it was deposited with either the First National Bank of San Jose or the—our attorney out there can tell you, Mr. David Burnett.

Q. Do you know who made the deposit?

A. Seven or eight or ten people.

Q. He purchased for the purpose of having it conveyed to the railroad company?

A. Yes; I think so; that was done under the supervision of Mr. Burnett. Mr. Burnett was, I think, president of the railroad company; he was made president so he could attend to matters out there.

Q. I believe you said that all agreements you made with Mr. Anderson were made by you, acting personally, with him? A. On account of the railroad?

Q. For anything.

(Deposition of Charles A. Nones.)

A. No, I must have misunderstood you, because Mr. Anderson received a commission on the sale of some lands belonging to the company.

Q. With that exception?

A. With that exception, yes.

Q. Did you ever state to Mr. Anderson that The Quicksilver Mining Company had purchased and had had delivered to it all steel rails, railroad ties and other equipment necessary for the construction and completion of any railroad? A. No.

Q. Or any statement to that effect? A. Never.

Q. Wholly or partly? A. Never.

Q. Did you ever state to Mr. Anderson that a railroad now named the San Jose & Almaden Railroad Company would be [142] fully constructed within ninety days from March 5, 1912? A. Never.

Q. Or anything to that effect, wholly or partly?

A. Never.

Q. Did you ever state to Mr. Anderson that the San Jose & Almaden Railroad Company would be constructed within ninety days from March 5, 1912, and that upon the construction of that railroad The Quicksilver Mining Company would pay Mr. Anderson for any moneys laid out by him? A. No.

Q. Or wholly or partly to that effect?

A. Never.

Q. Did you ever state to Mr. Anderson that at said time the amount and reasonable value to be paid to him for any services rendered to The Quicksilver Mining Company would be fixed and the amount of expenditures so made by him would be fixed and

(Deposition of Charles A. Nones.)

settled and would be paid, together with the amount and reasonable value of all services rendered by him?

A. I think that my answer to the \$4,500 covers that, Mr. Harby.

Q. I understood you to say that \$4,500 was paid to him? A. No, it was not paid to him.

Q. It was to be paid?

A. Yes, he had my personal letter, and it was my intention to bring the matter up before the Board of Directors and then explaining matters to them and allowing them to pay Mr. Anderson the \$4,500 out of the \$4,500 on deposit to the credit of the Railroad Company in San Jose.

Q. That is, you hoped to obtain the authorization from The Quicksilver Mining Company to pay Mr. Anderson the amount for which you personally obligated yourself?

A. That is correct, yes, Mr. Harby.

Q. Did you ever fix the amount and value of the services [143] that Mr. Anderson rendered to you?

A. No; I fixed it at \$4,500 arbitrarily, that being the amount of cash on deposit voted as a cash subsidy.

Q. Did you ever tell Mr. Anderson that he had rendered any services to The Quicksilver Mining Company? A. I don't think so.

Q. Did you, on March 5, 1912, or at any time, tell Mr. Anderson that The Quicksilver Mining Company had purchased and had in its possession rails, ties and other materials and appliances for the construction of any railroad? A. No, never.

Q. Did you ever make any statement to Mr. Ander-

(Deposition of Charles A. Nones.)

son which you knew to be false for the purpose of deceiving and misrepresenting the truth to him and misleading him? A. No.

Q. Did Mr. Anderson say to you that he would render services in the matter of procuring rights of way and doing anything else for the railroad and would accept his pay at the time of the completion of the railroad out of the said bonus of \$4,500; was that the understanding?

A. That was the understanding.

Q. Where were your conferences with Mr. Anderson held? A. In San Jose and at the mine.

Q. Did you say to him that he would be paid for services to be rendered to you at any special time or upon any fixed event happening; when was he to receive the pay?

A. Upon the completion of the railroad, when the subsidy came due.

Q. You explained to him, then, did you not, that his pay depended upon the railroad being built?

A. Precisely. [144]

Q. What did you say to him with respect to when he would be paid?

A. Mr. Anderson was the person who received these subsidies amounting to \$4,500, approximately, and I think it was the full amount of \$4,500, but I really don't remember.

Q. What he received was an agreement to have subsidies to be paid?

A. He received the agreement from the different property owners along the line to pay subsidies, and

(Deposition of Charles A. Nones.)

they paid them into this bank, and I don't know which bank it was.

Q. It was deposited in bank conditionally?

A. Deposited in a bank in San Jose.

Q. Conditionally?

A. Conditionally, upon the completion of the railroad.

Q. Did you tell him in that connection when he was to be paid for these services?

A. Mr. Anderson had a letter from me stating that I would pay him \$4,500 upon the completion of the railroad, signed by me, not as president, but simply in person.

Q. Was there any other agreement between you?

A. None other.

Q. And Mr. Anderson accepted that letter?

A. That is the only agreement.

Q. You gave Mr. Anderson a promissory note for \$4,500; did you not?

A. I don't think so; I think it was an agreement.

Q. Did you ever give him a note of The Quicksilver Mining Company? A. Never.

Q. Was it ever your intention to give him any note of The Quicksilver Mining Company?

A. It was not.

Q. Have you in your possession now any written agreement [145] with Mr. Anderson which you can produce?

A. I believe I have a letter from Mr. Anderson at my home which will prove that this transaction was personal and not corporate.

(Deposition of Charles A. Nones.)

Q. Will you produce that at the next hearing; will you try to find that letter and produce it?

A. Yes; I will try to.

Q. Excepting as appears in the minute-book, Ex. 1 for identification, has any resolution ever been passed by the Board of Directors of The Quicksilver Mining Company assuming or authorizing the expenditure of any moneys for any railroad or water-power?

A. Excepting as stated in the minute-book?

Q. Yes. A. No.

Q. There is in the minute-book, Exhibit 1 a minute of a resolution introduced by Mr. Swayne on March 18, 1912.

A. I remember it, concerning the expenditure of \$3,000.

Q. No, it is authorizing some transfer to the Senonac Power Company?

A. The water rights, yes, to be sold.

Q. Was any transfer ever made?

A. Yes, it was.

Q. Were those securities of the Senonac Power Company issued for that transfer ever sold?

A. No.

Q. The resolution provides that they might be sold at a price not less than \$200,000, reserving certain rights to the company? A. Yes.

Q. They were never sold? A. Never sold.

Q. Now, did you pay Mr. Anderson any sums of money for any services rendered by him with respect to a railroad or water-power company?

(Deposition of Charles A. Nones.)

A. I am under the belief that Mr. Anderson received a commission on every purchase he made.

Q. Purchase of what?

A. Right of way. [146]

Q. Moneys were paid out for right of way?

A. I think he received a certain commission for his work, but I would not be positive, but he received his expense money.

Q. Did you pay out any money for rights of way?

A. Yes.

Q. About how much?

A. I couldn't tell you, sir; I think something over \$1,200.

Q. And you paid that out through Mr. Anderson?

A. Mr. Burnett O. K.'d the vouchers, and that was part of the \$3,000 that was authorized by the Board of Directors of The Quicksilver Mining Company; that was all included in that sum.

Q. Was that disbursed by Mr. Anderson, that \$3,000?

A. I couldn't tell you how it was disbursed; that was done under Mr. Burnett's direction.

Q. You paid the money to Mr. Burnett?

A. The Quicksilver Mining Company through Mr. Tatham and upon my O. K. paid the money to Mr. Burnett, as I remember it.

Q. Whether he had any dealings with Mr. Anderson personally you do not know?

A. How do you mean?

Q. As to whether he did anything with Mr. Anderson?
A. Whether he paid Mr. Anderson?

(Deposition of Charles A. Nones.)

Q. Yes.

A. I don't know. I don't know who paid Mr. Anderson, but I do know that Mr. Anderson was paid for his work in getting this right of way.

Q. How do you know that Mr. Anderson was paid for his work?

A. Because it came out of The Quicksilver Mining Company.

Q. That is, you have seen the accounts of The Quicksilver Mining Company where these disbursements were charged?

A. Yes, and I have seen Mr. Anderson's receipts for the moneys advanced. [147]

Q. Whereabouts did you see those?

A. In the records of the Almaden Railroad.

Q. In San Jose, California? A. Yes.

Q. So that what you have seen purported to be records of moneys paid to him by the New Almaden Railroad Company? A. Yes.

Cross-examination by Mr. BLANDY.

I was president of this Quicksilver Mining Company, I think, for a period of five years. My connection with the company ceased in June, 1913. I do not know whether the transactions covered by this litigation occurred in 1912 or not; I have not read the particulars; I do not remember whether it occurred in 1912 or 1913; I know it did not occur in 1913.

Q. You are no sure as to whether it was a year preceding 1912; is that what you have in mind?

A. Yes, sir.

(Deposition of Charles A. Nones.)

Q. If I understand your testimony, you say that the matters covered by Mr. Anderson's suit were matters for which you were personally responsible to him? A. Yes.

Q. And that they have no concern with the Quicksilver Mining Company? A. Yes, sir.

Q. I understand that you predicate that claim upon the circumstance that you wrote a letter to him which you have referred to in your direct testimony; is that right? A. That is correct; yes, sir.

Q. I have not seen that letter; have you a copy of it, Mr. Nones? A. No, sir. [148]

Q. And I understand also from the direct testimony that you received a reply to that letter from Mr. Anderson?

A. No, not from that letter; that letter was written out in California. The letter that I wrote Anderson was written in California; the letter that I referred to at the last examination was a letter that Mr. Anderson wrote me months afterwards in which he held me personally responsible.

I have not been able to find that letter as yet; I have made a search for it; I think it is at my home but I have been unable to find it as yet; I have searched my home fairly well; what I consider to be a reasonable search. I should not say it is lost; I think it is among my letters, but I have been unable to find it, having about possibly a thousand letters to go over. I shall pursue the hunt and will let you know at a given date whether I can find it or not.

Q. Now, Mr. Nones, if you employed Mr. Anderson

(Deposition of Charles A. Nones.)

to do this work for which he sued, why didn't you pay him? A. I was unable to pay.

Q. You mean inability? A. Inability, yes.

Q. Financial inability?

A. Yes, financial inability.

Q. Have you ever taken up with Mr. Anderson the question of your financial inability to pay him?

A. Mr. Anderson is acquainted with my financial inability through my attorneys.

Q. I did not ask you that, Mr. Nones; I do not want to be captious; I am going to ask you a few questions and I would like to have direct responses, and not any shading off.

(The last question was repeated to the witness.)

[149]

A. My attorneys have notified Mr. Anderson to that effect.

I have never had any personal conversations with him on the subject of my inability to pay this claim; I am not now connected with The Quicksilver Mining Company. During the time I was president, covering this period of five years, I was not engaged in any other business. I devoted myself to the interests of The Quicksilver Company. I was an active president; my office was at No. 45 Broadway; the staff there was myself, Miss Bowe and a small boy.

During that five years the officers were myself as president; Mr. Frank, vice-president; Miss Bowe, secretary, and during that time the treasurers were L. B. M. Haag, for a short time a young man whose

(Deposition of Charles A. Nones.)

name I cannot remember, and later on Mr. Tatham,— Mr. J. F. Tatham was general manager and treasurer. Mr. Tatham was in California; the offices previous to 45 Broadway were 42 Broadway, for about a year. Miss Bowe and myself occupied the suite of rooms at 42 Broadway and at 45 Broadway. Mr. Frank occasionally, and the office boy. During that five years there were eleven different directors; I would have to look up all the names to tell you who they were.

Q. When did you hold your annual election?

A. I believe it was the third Wednesday of each June.

The annual election was held at the Company's office in New York; those offices, 42 and 45 Broadway, were the locations for transacting the fiscal business of the corporation. The plant was located in Santa Clara County, near San Jose, in California. I was in the habit of making many visits out there. [150] I went on the company's business.

Q. Such as would arouse the interest of the president?

A. Whenever I considered it necessary I went out there on the company's business.

The company had offices out there at the mines and later on an office in the First National Bank Building, San Jose.

Q. The office at the mine, what was that, anything more than a mere shed for the foreman?

A. Oh, yes, very extensive offices.

Q. If you and the treasurer and secretary and

(Deposition of Charles A. Nones.)

office boy and all the rest of the clerical force were located down here at 42 and 45 Broadway, what need was there for these offices?

A. Well, the transactions of The Quicksilver Company necessitated a cashier out there, a man to make up the payrolls, to pay the men, to buy supplies. In fact the working part of The Quicksilver Company was in California; the clerical force, as you might term it, or the fiscal force, was in New York.

Q. Did you ever hold any directors' meetings out in California? A. No.

Q. This letter which you say you wrote to Mr. Anderson was written, if I am correctly advised, in the offices of the company out at the mine?

A. Yes, it was written in the company's offices on the company's stationery at the mine.

Q. Now, as I have never seen that letter and we do not seem able to put our fingers on it, can you give me its general purport from memory?

A. Yes.

Q. Do; start with the date if you can?

A. That I cannot; I do not remember the date.
[151]

Q. You can give us some approximation, can't you?

A. The letter stated that upon the completion of the San Jose & New Almaden Railroad and the receipt of \$4,500 that I would obligate myself to pay C. P. Anderson, or to see that he received the sum of \$4,500 for his services.

(Deposition of Charles A. Nones.)

Q. That is as near as you can come from recollection? A. Yes.

Q. To the contents of the letter? A. Yes.

Q. Well, I suppose it was addressed to Mr. Anderson, was it?

A. It was given by me to Mr. Anderson personally.

Q. Yes, but was it addressed to him? A. Yes.

Q. You spoke of \$4,500; is that the \$4,500 that is referred to in his complaint? A. Yes.

Q. Is that the only sum of money that was referred to in the letter?

A. That is the only sum of money that was referred to in the letter.

Q. I see running through the papers handed to me an item of \$411, as if for disbursements. Is that in any way associated with the \$4,500 referred to in your letter? A. I know nothing about that.

Q. Was it a substantial, well-established railroad, or was it a new thing, a spur to a main track?

A. It was a road to be built.

Q. To be built? A. Yes.

Q. In connection with The Quicksilver Company's works?

A. No, I would not say in connection with The Quicksilver Company, but The Quicksilver Company could have used it very advantageously.

Q. Whose conception was that, yours?

A. Mine. [152]

Q. Then you ought to know what you conceived it for, what was the purpose to which that road was to be put?

(Deposition of Charles A. Nones.)

A. You had not asked me that question before; you asked me to answer the question you put.

Q. Now, I have put a concrete question to you, haven't I?

A. To facilitate the moving of traffic and handling of our goods.

Q. When you say "our goods," you mean The Quicksilver? A. Yes.

Q. It was a species of aid to the company's business purposes, wasn't it? A. It was,

Q. And I think you have stated—and if you did not somebody has, I think—that all the stock of the railroad was owned by The Quicksilver Company?

A. It was.

Q. So, isn't this a fair statement, Mr. Nones, that that was a piece of business enterprise to further the interests of The Quicksilver Company?

A. On whose part? You asked me whether it was a piece of business to further, on whose part?

Q. I have not asked that.

A. I cannot answer that question.

Q. Why?

A. Because it leads me too much in the dark.

Q. You said you conceived the project?

A. Yes.

Q. You were president of the company?

A. Yes.

Q. And you told us what its purpose was?

A. Yes.

Q. Surely a natural corollary to that would be that it was a piece of business enterprise to further the

(Deposition of Charles A. Nones.)

interests of The Quicksilver Company?

A. I have already testified to that, yes, sir. [153]

Q. All right. Now, having told us about the railway, I see running through the testimony some rights of way? A. Yes.

Q. Were they associated with the railway?

A. Yes.

Q. I also find an allusion made to some water rights? A. Yes.

Q. Were they associated with the railway?

A. No, sir.

Q. That was a new enterprise? A. Yes.

Q. Was that your conception also? A. Yes.

Q. That was also to further the best interests of The Quicksilver Company? A. Yes.

Q. Then you must have been a pretty active president? A. It seems so.

Q. You said that, didn't you?

A. I don't know how active I was.

Q. You devoted the whole of your time to the interests of The Quicksilver Mining Company?

A. Yes.

Q. Is Mr. Anderson a friend of yours?

A. Not at present, although I have nothing against Mr. Anderson.

Q. Well, having drawn a distinction between the present and the past, was he ever a friend of yours?

A. You asked me if he was a friend of mine; I say he is not but I have nothing against Mr. Anderson, but he has considerable against me; that is what I meant by my answer; you did not ask me if I was

(Deposition of Charles A. Nones.)

a friend of his; you asked me if he was a friend of mine; I draw that distinction.

Q. You have already told me that you made yourself the primary debtor to him in respect to this \$4,500, and you had not paid it because your financial situation would not permit it; were you ever sued for it? A. Never.

Q. Did you ever put it in the form of an obligation to Mr. Anderson? A. I have.

Q. In what shape? [154]

A. In my bankruptcy schedules in June, 1913.

Q. Then you have been adjudicated a bankrupt?

A. Yes.

Q. Voluntary bankruptcy? A. Involuntary.

Q. In the Southern District of New York?

A. Yes; I have been thrown into involuntary bankruptcy.

Q. Mr. Nones, you said that you had been thrown into bankruptcy; do you know enough about the bankruptcy procedure to know whether the court adjudicated you a bankrupt?

A. No, sir, I do not understand the word.

Q. You spoke about it and filed your schedules?

A. Yes. I think I have been adjudicated a bankrupt; I have been discharged; I quite recently applied for my discharge.

Q. Please tell me what you mean by saying that you had recognized your primary obligation as a debtor to Mr. Anderson by putting him in your schedules?

A. Because in this letter that I referred to Mr. An-

(Deposition of Charles A. Nones.)

derson had held me personally responsible for the sum of \$4,500.

Q. Are you referring to the letter you wrote or the letter he wrote?

A. To the letter he wrote me, which I have been unable to find as yet.

Q. Mr. Nones, are you not sufficiently familiar with business matters to know that the contraction of that obligation would be when you wrote your letter to Mr. Anderson and not Mr. Anderson's reply to you?

A. No, sir, it would be impossible to hold the company.

Q. I ask you that question?

A. I do not understand the question. (Question repeated to the witness.) [155]

A. Yes.

Q. So that we may understand each other, what I mean by that is this,—it would be your letter to him that would create the primary obligation from you to him, wouldn't it?

A. I should imagine that would be a matter for the courts to decide; I could not answer that question.

Q. You have attempted here to give your interpretation of the letter that you wrote? A. I have.

Q. And you have said that in that letter you have made yourself personally responsible to Mr. Anderson? A. I have.

The intent and purposes of the letter would create a personal obligation; I signed the letter in my individual name.

(Deposition of Charles A. Nones.)

Q. And that you did not put the designation "president" underneath? A. No, sir.

Q. Is it your idea that because you did not write the word "president" or print the word "president" after your name that therefore it is your personal obligation?

A. No, sir, but all the explanations were made to Mr. Anderson at the time.

Q. Now, we are dealing with the letter, Mr. Nones; you have told us in the most unqualified way that that letter from you to Anderson made you personally obligated to Mr. Anderson? A. Yes.

Q. And you supplement your statement that you personally obligated yourself to him by saying that you recognized that obligation in your schedules?

A. Yes.

Q. What did you do in your schedules to bear that out? [156]

A. I do not remember, Mr. Blandy; it is a matter of record.

Q. I know it is, and we are dealing with your memory?

A. I do not remember, Mr. Blandy; I know the statement in there is for work done in California, I think it is, but I am not sure.

Q. Well, that would be this same work, wouldn't it? A. It would.

Q. That we have been speaking of, this railway and the right of way and the water privileges, etc.

A. I do not think Mr. Anderson ever had anything to do with the water; not that I remember.

(Deposition of Charles A. Nones.)

Q. Anyway, so far as you are concerned, you did not put your personal obligation forward in respect to the water rights with him?

A. I never made any contract with Mr. Anderson concerning water rights; never had any understanding with him concerning water rights.

Q. So that the only contract you made with him would be in connection with the railway?

A. Precisely.

A. Now, coming back to the schedules, for I want to get on a footing of understanding with you in that respect, is it your best recollection that you put Anderson in as a creditor for \$4,500? A. It is.

Q. As if you owed him \$4,500? A. Yes.

Q. Did you swear to your schedules? A. I did.

Q. You intended to put nothing in your schedules except what was true? A. Precisely.

Q. You do intend, Mr. Nones, to be truthful in all your statements, don't you? A. I hope so. [157]

Not only to Mr. Anderson and to the court in my schedules but in all my dealings in connection with this Quicksilver business I have endeavored to make true statements. My bankruptcy schedules were prepared under the auspices of competent counsel; I first had Patrick Rooney, 111 Broadway, and later on Pressinger & Newcombe, 60 Wall Street. Patrick Rooney prepared the schedules and I have not the least doubt but what he is an intelligent gentleman of integrity.

Q. Now, tell us what you said in your schedules about this \$4,500 debt to Mr. Anderson.

(Deposition of Charles A. Nones.)

A. I believe I stated in the schedules for work done in California, services rendered in California; I do not remember the phraseology.

I gave the particulars to Mr. Rooney to enable him to prepare the schedules; I had no business interests in California outside of The Quicksilver Company.

Q. I want to be frank with you, Mr. Nones; I have put this question several times, so that I think your mind is centered upon just what I mean; I have asked you whether in connection with this \$4,500 transaction, you made yourself primarily liable to Mr. Anderson for it? A. Yes, answer yes.

I understand that you have emphasized the word "primarily" and what you mean by it.

Q. That is to say, that that was a transaction between two men, you on the one hand and Mr. Anderson on the other? A. Precisely, Mr. Blandy.

Q. Now, Mr. Nones, if I should remind you of the fact that in your schedules you swore that you were not primary debtor, what would you say? [158]

A. How do you mean?

Q. I mean what I said in that question?

A. What do you mean by primary debtor?

Q. That is the very question I have been emphasizing with you a moment ago; if I should tell you that in your schedules, which you swore to and said were prepared, that you stated you were not the primary debtor, what would you say

A. I would be very much surprised.

Q. You would be surprised? A. Yes.

Q. Then you look at your schedules?

(Deposition of Charles A. Nones.)

A. Then they have not been prepared the way I gave them.

Q. You said you gave Rooney instructions to draw them? A. Yes.

Q. And they were sworn to by you? A. Yes.

Q. And you knew what was in the schedules?

A. I did not read the schedules over after they were written; I did not read them.

Q. It is your duty .

A. I did not read them, no, sir; I did not. May I ask you a question, Mr. Blandy; isn't this claim of the \$4,500 in the schedules?

Q. Yes. A. That is all I know then.

I could not say without referring to the minute-book how often we had directors' meetings in the year 1912; I do not remember. I should say that long spells frequently happened when we were unable to get a quorum of our directors together.

Q. Well, the business interests of the corporation did not suffer on that account, did they?

A. No, sir [159]

Q. You were on hand? A. Yes.

Q. You knew all about the business? A. Yes.

Q. You are a practical man are you not; I mean by that that you are vested in the science of this quicksilver business? A. No, sir.

Q. What would call the person that is "Scienced" would you call him a chemist or engineer?

A. An engineer.

Q. And you do not claim to be an engineer?

(Deposition of Charles A. Nones.)

A. No, sir.

Q. But you had sufficient business dealings in connection with The Quicksilver Company to have acquired quite a considerable knowledge of the product of the mines?

A. I have quite considerable, yes, Mr. Blandy.

Q. Well, when you sent out your notices to the directors for a directors' meeting and your directors did not respond in sufficient numbers to constitute a quorum, did you assume to transact any directors' business in the absence of a quorum?

A. I do not think so, but I would have to refer to the minutes to answer that; I do not think so; I think it would be against the By-laws of the company.

Q. Wouldn't it be against the canons or common principles of the corporation to assume to transact business unless there was a quorum?

A. I would assume so, yes, Mr. Blandy.

When there was not a quorum about all that occurred and all that was practically done was to just have a little social gathering between a few of the directors. This occurred very frequently in these directors' meetings. It was no fault of mine that there was no quorum, the people didn't come. Notices were sent out regularly. These directors' meetings were designated to be had at stated places and at the date named in the by-laws. The majority of the directors lived in New York. A majority constituted a quorum. I think there were eleven on the Board of Directors; eleven was the [160] limit. A great many times the directors did not respond so

(Deposition of Charles A. Nones.)

as to make up a quorum and we simply adjourned. The company continued business, went right straight on.

Q. Then a quorum of the directors was not essential to the conduct of the business of the corporation, is that the idea?

A. No, sir, it is not the idea, because I think a quorum is essential at times.

Q. How did you manage to get along when you could not get the assent of your directors?

A. We had to postpone until the next meeting the same as any corporation.

Q. Meantime the corporation continued?

A. It went on the same as any corporation.

Q. Who ran it?

A. The different superintendents of divisions and the president.

Q. And the president?

A. And the president.

The corporation did not suffer because of the circumstances that there was not a quorum of the directors.

I have been out of the company since June, 1913; when I was in it it was in good condition, able to pay its debts; I do not know whether it is now. I was a stockholder in the company; I am not now. I sold my stock, transferred it a good many years ago. I was a stockholder during the time I was president. I think I had one hundred and odd shares. I do not think I had parted with those shares before my office as president expired; I think

(Deposition of Charles A. Nones.)

both about simultaneously, or I may have [161] parted with some; that is another matter I could not answer without investigating. I do not own any stock now; I disposed of it in the open market. I have no interest in the corporation now.

The company did not build a paint factory, nor did I; it was never built. It was thought of; it was a conception of mine. I believed it would prove beneficial to the company. Any of the projects that I conceived as president I thought would inure to the best interests of The Quicksilver Company, otherwise I should not have proposed them.

I cannot say that there was no quorum from the period beginning October, 1911, to March, 1912, a period of about six months; I do not remember any stated period at which there was no quorum. I know that [161½] there was no quorum several times but I have no special recollection of any stated period where there was no quorum; I cannot give the dates. I would not say that your data from October, 1911, to March, 1912, was incorrect.

Q. I notice, too, that in the minutes from time to time the president made his report to the directors, when there was a quorum present; you would be that president, wouldn't you? A. I would.

Q. Was your report usually in writing or was it a general *viva voce* statement?

A. It varied, at times it was in writing and at other times oral.

Q. Is the secretary here a shorthand writer (re-

(Deposition of Charles A. Nones.)

ferring to Miss Bowe)? A. Yes.

Q. I also notice a series of resolutions, the substance of which is a ratification by the directors of *ad interim* action of the officers; what officers were those resolutions designed to ratify?

A. I could not tell you according to the information you give me there, Mr. Blandy.

Q. Haven't you any recollection of there having been read into this reference a series of resolutions proposed by you and passed by the directors ratifying the action of the officers of the corporation during the period of the preceding quorum meeting of the directors?

A. I think that was done at all the meetings; it was not any special meeting when it was done; I think that was the custom.

Q. That was a custom established by you, wasn't it?

A. No, a custom established by the company, as I remember it, to my best knowledge and belief.

Q. Before you came in? A. Yes.

Q. You had had a president ahead of your period?
[162]

A. Oh, yes, the company is quite old.

Q. Who was your immediate predecessor?

A. Mr. Bailey.

Q. He was a man of parts? A. Yes.

Q. A man of business experience?

A. I could not tell you.

Q. You followed in his wake? A. Yes.

Q. So when you did succeed in getting your Board

(Deposition of Charles A. Nones.)

of Directors together, Mr. Nones, you intended to legalize whatever had been done by the officers during the interval, didn't you?

A. I do not think I understood your form of question, if you are putting this next question, suppose—

Q. It is beginning to shed some light on you, is it?

A. Possibly I am a rather dim person to shed light on, but I understood you to say that the meetings of the board were ratified at subsequent meetings, that is, at the subsequent meetings the previous meetings, the previous records of the minutes, were read and approved.

Q. That is one thing that would be about the first order of business? A. Yes.

Q. That is so in every corporation?

A. I think it is.

Q. Now, what I directed your attention to was the fact that after going through that formality, then the action of the officers in anything they may have done in the interval between the preceding directors' meeting and the meeting was ratified and approved?

A. I do not think it was ever done, Mr. Blandy.

Q. Well, it appears in evidence right in this reference, Mr. Nones? [163]

A. It may have been done in some special instances, but it was not the custom of the company.

Q. It was done under your auspices?

A. In some special instances, possibly.

Q. What do you mean by "special instances"?

(Deposition of Charles A. Nones.)

A. When a certain matter came up for the approval of the Board of Directors it would be customary to approve the action of the officers, but it was not, to my best knowledge and belief the custom of the company to approve at all meetings of the directors every action of its officers.

Q. You mean by that that if a resolution would be presented by you or anybody else to ratify the action of the officers in the interval between that meeting and the preceding one, that you would lay fully before the Board of Directors the particular business that had been transacted by the officers which you wanted them to ratify?

A. I most certainly do.

Q. Then if the secretary states to the contrary, would she be of fault?

A. I imagine one of us would be wrong.

Q. Supposing anybody else on this reference,—supposing Mr. Swayne said it was the universal custom not to lay before the directors the business that had been transacted, but to pass an omnibus resolution ratifying the action of the officers, would that be a correct statement?

A. I do not remember any such occurrence, Mr. Blandy.

Q. Well, then, do you assert the proposition that under your auspices as president, if a resolution was passed ratifying the action of the officers in the interval, that [164] the particular business or matter or business the officers had transacted would be laid before the directors for their consideration?

(Deposition of Charles A. Nones.)

A. To the best of my recollection and belief.

Q. The minutes would determine that?

A. They would.

I will stand by the minutes; I think I ordinarily dictated those minutes. I did not boss the whole thing; I was the president and as such had control of the company.

Q. You have seen this effusion issued under the auspices of H. F. Dollars and C. F. Tracy, purporting to be the minutes of the meeting of stockholders of The Quicksilver Mining Company held at the office of the company, 45 Broadway, on the 15th day of February, 1913, you have seen it, haven't you?

A. I have not read it, no, sir; I didn't pay enough attention to it to read it. [165]

Q. During that time were you not interested in the reproduction of the colloquy and the colloquies that took place between the disgruntled stockholders and yourself on that occasion?

A. No, Mr. Blandy, I was something like David Harum's flea-bitten dog; the fleas kept him so busy scratching that he didn't have time to think of his other troubles; I was something like that dog.

Q. David Harum says that fleas are good for a dog, doesn't he? A. I am not a dog.

Q. Well, there cannot be much doubt but that on the 15th of February, 1913, there was a special meeting of the stockholders held at 45 Broadway?

A. There is no doubt about that; that is undoubted.

Q. You called that meeting? A. I did.

(Deposition of Charles A. Nones.)

Q. You were in the chair?

A. I believe so, yes.

Q. Until you were ousted?

A. Until I was ousted.

Q. You have no recollection that a motion was put to remove you as president at that meeting?

A. I have a very vivid recollection of it.

Q. Have you any recollection of the fact that at the meeting several questions were put to you not only by Mr. Harby but also by different stockholders and you answered those questions?

A. I believe some questions were put; what the questions were I do not remember.

Q. There was considerable acrimony on that occasion? A. Almost.

Q. You were in a very unpleasant position?

A. Something like the dog? [166]

Q. Yes, sir, but you held your ground notwithstanding, didn't you? A. About ninety days.

Q. I mean so far as the meeting is concerned you asserted your rights as president and refused to recognize Mr. Harby's right?

A. I do not remember that I did.

Q. That is the best answer you can give me to that question? A. Yes.

Q. Now, Mr. Nones, this was a very acrimonious meeting; you were in the chair as president and the meeting had been called by you and turned into a meeting evidently in the interest of disaffected stockholders, and you mean to tell me that that has passed clean out of your mind?

(Deposition of Charles A. Nones.)

A. Absolutely, Mr. Blandy.

Q. Do you remember this question being put to you by Mr. Harby: "Mr. HARBY.—I would like to ask if the company obtained a charter for the building of a railroad? The CHAIRMAN.—No, sir. Mr. HARBY.—Was anything expended on account of obtaining a charter? The CHAIRMAN.—Yes, about \$3,500. Mr. HARBY.—I would like to ask you how that was expended? The CHAIRMAN.—That was expended under direction of counsel, Mr. Burnett, of Wilcox & Burnett, of San Jose. Mr. HARBY.—For what purpose? The CHAIRMAN.—For the purpose of obtaining rights of way for the New Almaden & San Jose Railroad, of which The Quicksilver Mining Company owns all the stock. Mr. HARBY.—This road you mentioned is an incorporated affair? The CHAIRMAN.—Yes. Mr. HARBY.—And the stock has been transferred to The Quicksilver Mining Company? The CHAIRMAN.—Yes, sir. Mr. HARBY.—But a franchise for the road has not been obtained? The CHAIRMAN.—It has, but not in the name of the Quicksilver Mining Company; in the name of the New Almaden [167] & San Jose Railroad Company." Do you remember that little colloquy between yourself and Mr. Harby?

A. I do not remember it, Mr. Blandy, but to my best knowledge and belief I confirm what I said in answer to those questions.

Q. In other words, while you do not remember the circumstances that that discussion took place be-

(Deposition of Charles A. Nones.)

tween yourself and Mr. Harby, you affirm the truth of the matter included in the discussion?

A. To my best knowledge and belief it is true.

Q. Reading further from this meeting of the 15th of February, on page 15: "Mr. HARBY.—Has anything been done towards the construction of the road? The CHAIRMAN.—Grades have been cut down. Mr. HARBY.—To what extent. The CHAIRMAN.—Possibly \$1,500, or \$2,000, has been spent; I cannot tell you exactly. A STOCKHOLDER.—I beg pardon—that question was, to what extent not what was spent. The CHAIRMAN.—To what extent—the heaviest part of the rock grades? The Same STOCKHOLDER.—I should imagine that the answer to that question should be—pardon me— The CHAIRMAN.—The percentage of the right of way is mostly over flat land; it has only been the heavy grades which have been cut down. Mr. HARBY.—Was it a mile or two miles? The CHAIRMAN.—No, I should say anywhere from a quarter of a mile to three-eighths of a mile of heavy grades. Mr. HARBY.—Did the directors authorize the expenditure of that \$3,500? The CHAIRMAN.—They did." Have you any recollection of that colloquy?

A. No recollection of it, Mr. Blandy.

Q. Is there anything in that that occurs to you as being untrue?

A. No, sir, the directors of the railroad authorized it.

Q. This inquisitorial examination of you by Mr.

(Deposition of Charles A. Nones.)

Conboy and others at that meeting, these individual stockholders as well— [168]

A. Mr. Conboy was my attorney.

Q. Well, questions were put by Mr. Conboy, also by Mr. Harby and by individual stockholders, which were designed to get information from you in respect to the expenditure of money of The Quicksilver Company; wasn't that the purpose of the series of questions put to you?

A. I assume so without acknowledging it.

Q. You as president were under fire?

A. I am not the first president that has been under fire.

Q. But you knew you were under fire, didn't you?

A. Certainly; I knew there was some disagreeableness.

Q. And they wanted information as to The Quicksilver Company's affairs; that is what they wanted, isn't it? A. I do not know what they wanted.

Q. The line of questions showed that, didn't it?

A. The line of questions showed that they wanted a great many things.

Q. Were you here when Mr. Swayne gave his testimony? A. Yes.

Q. Do you recall at this moment anything that Mr. Swayne swore to was false? A. No, sir.

Q. Now, just read and inwardly digest from your observation of that nice little sentence to which I have called your attention, and after you have read it, assuming that to be true, "I do not see that there is anything to do at this meeting except to see what

(Deposition of Charles A. Nones.)

the president has to say," if you made that statement and it is sworn to by Mr. Swayne that you did make that statement, and if that is true, weren't you asserting your own position as president in a most emphatic manner (handing to the witness the book from which the sentence just [169] quoted is taken) ?

A. Supposing we leave that to history; I do not know whether I did or not.

Q. Well, do you refuse to answer that question ?

A. Certainly I do.

Mr. BLANDY.—The minutes from which the last questions were read are offered by the plaintiff for identification. (Being the record of the minutes of the meeting of stockholders of February 15, 1913.)

The minutes just offered in evidence were marked Plaintiff's Exhibit 1 for Identification, February 24, 1915.

Q. Was there any season of the year when you made it a point of going to California ?

A. No, I went at all seasons.

Q. Have you any recollection whether the Board of Directors of your company approved your action as president in receiving the stock of this railroad company for the account of your company ?

A. No. I have no exact recollection of that.

Q. Why should this railway company turn the stock over to The Quicksilver Company ?

A. Because The Quicksilver Company were financing the railroad company, accepting the notes of the railroad company, for moneys received, or

(Deposition of Charles A. Nones.)

moneys given out, rather.

Q. Does that mean in plain English that The Quicksilver Company bore the expense of the railway company, constructing the railway?

A. It bore the expense. [170]

Q. But Mr. Nones, coming back again to the subject matter covered by this letter of yours to Anderson and your statement in answer to a series of questions by me that that was a primary obligation of yours to Mr. Anderson, have you any different answer to give?

A. Except that I do not understand the word "primary," possibly as you do.

Q. What is your understanding of the word "primary"? A. I understand it was "personal."

Q. Do you say now that this transaction of this \$4,500 was a personal, private obligation of yours to Mr. Anderson?

A. I say that the \$4,500 was the amount that Mr. Anderson claimed that I owed him and that my letter to Mr. Anderson was that I would be responsible for the \$4,500, but there was a reason for that.

Q. You have already stated on your direct that you employed Mr. Anderson to do this work; that you signed a letter with your own name to it, did not add to it the word "President," and that that was your debt?

A. Yes, and I will confirm it and I will double confirm it.

Redirect Examination by Mr. HARBY.

Q. Mr. Nones, you were just asked a question on

(Deposition of Charles A. Nones.)

cross-examination which you said you could not answer without explaining the matter in full, referring, I presume, to the Anderson matter; will you please make whatever explanation you have in mind?

A. I had no authority to offer the \$4,500, under discussion to Mr. Anderson, that being a company matter and the \$4,500 being deposited in a bank in San Jose by people living along [171] the right of way of the proposed railroad, but I told Mr. Anderson that I personally would be responsible for the payment to him of \$4,500 and that if the company did not turn him over the \$4,500 I would.

Q. Did you say anything to him at the time about what authority you had to deal with him?

A. I told him I had no authority from the corporation to turn him over the \$4,500, and that is the reason why for his own protection I made a personal contract.

Q. With regard to his employment, did you tell him anything about your authority?

A. No, I do not remember having made any statement to him about his appointment, because he did not have any appointment; he was doing work for which he would be paid when it was completed.

Q. He did that work at your request?

A. He did that work at my request.

Q. And at the time did you say anything to him about your authority to employ him?

A. No, I do not remember saying anything about it, Mr. Harby.

(Deposition of Charles A. Nones.)

Q. Do you remember Mr. Swayne testified that with regard to this railroad the company never authorized the expenditure of more than a certain sum of money, which appears, is set forth, in the minutes; were you present when he testified to that?

Q. Yes, but I do not remember those exact words.

Q. I want to direct your attention to the general subject; do you remember his referring to the minutes of the meeting as set forth in the minute-book at page 341, which has been marked for identification, where he referred to the following minute; I think he referred to it in substance, but I will read it to [172] you from the book: "The president then read a paper regarding an electric road to be built as follows (see page 342), and on motion of Mr. Whicher and seconded, it was resolved that before taking action on an electric road to be built from San Jose to the mine, that the president furnish a complete specification showing itemized costs, possible earnings, etc., to be submitted at a future meeting of the Board. Mr. O'Brien stated that he knew a competent engineer who could furnish such a report and he was requested to engage same." Do you remember Mr. Swayne pointing that out as being in the minute-book? A. Yes, I remember.

Q. And then do you remember his pointing out the minute of one meeting held on May 1, 1912, appearing at page 346 where there appears the following which I will read: "Moved and approved that the president's action in ordering the sum of, approxi-

(Deposition of Charles A. Nones.)

mately, \$3,000 to be charged to March expenses, said sum representing the amount of money actually expended upon right of way, surveys and cutting down grade for the proposed San Jose and Almaden road, all of which stock will be owned by The Quicksilver Mining Company. Further resolved that the president's action be approved in receiving the stock for account of The Quicksilver Mining Company from the San Jose and Almaden road, for the full amount of these expenses." Now, if I am not right in this, please correct me, but didn't Mr. Swayne say that that amount of \$3,000 was the only amount that the company had ever authorized to be expended on account of that road?

Q. Do you recollect that Mr. Swayne made a statement to that general effect? [173]

A. To the general effect, yes, but I do not recollect Mr. Swayne's words.

Q. Did the directors ever say that they would authorize the expenditure of any amounts on this road except such as appear to be set forth in the minutes which have been marked for identification?

A. The minutes tell the story.

Q. What I want to get you to say, Mr. Nones, is whether or not the minutes truthfully represent everything that was done by The Quicksilver Mining Company with regard to the San Jose and Almaden Road? A. Yes.

Q. At the time that you conceived the idea of building that road, had you, before doing anything

(Deposition of Charles A. Nones.)

with regard to it, first consulted the Board of Directors of the company?

A. I think so, Mr. Harby, I believe so; in fact I am quite sure.

Q. Were you the first one that suggested the railroad? A. The railroad was a necessity.

Q. Were you the first one that conceived the idea?

A. I could not tell you that; I do not remember.

Q. Did anyone suggest it to you or did you originate it?

A. No, as I remember it, I went out to California and I believed it was a necessity to the company.

Q. That was a result of your examination into certain conditions out there? A. Yes.

Q. And after you made that examination you arrived at the opinion that the road would be a good thing? A. Yes.

Q. That was while you were in California on some trip? [174] A. I think so.

Q. Did you then proceed to investigate into the thing? A. That is right.

Q. Did you employ people to assist you in this investigation while you were out there? A. Yes.

Q. Tell us specifically, if you remember; did you, while you were out there, having conceived this idea of building the road, then undertake an investigation into it and employ people to make further investigations to assist you, or did you return to New York and consult the directors about it?

A. I could not answer; it is too long ago; it is seven years ago.

(Deposition of Charles A. Nones.)

Q. No, it is two years? A. Six years.

Q. The minute is dated 1912 where the expenditure of \$3,000 is spoken of?

A. Yes, the first idea of building the road had occurred possibly a year previous; I could not tell you what I did, Mr. Harby.

Q. We are now in 1915; six years ago would be 1909; it was not under discussion in 1909, was it?

A. Under consideration?

Q. Yes.

A. No, but it was under consideration in 1912.

Q. By you? A. Yes.

Q. I do not find in the minute-book anything on the subject prior to September 20, 1911?

A. Well, that might be.

Q. I do not want to mislead you; I do not want you to think that I have examined every page to be sure that this is the first [175] item; I am asking you for information.

A. As near as I can remember I considered that idea first about the latter part of 1909 or 1910, but I would not be sure; I know it took me quite some time to get the concensus of the surrounding country.

Q. You proceeded to make an independent investigation? A. Yes.

Q. You examined into the population, I presume, and the needs of the locality? A. Yes.

Q. And got some idea of the cost of building this road? A. Yes.

(Deposition of Charles A. Nones.)

Q. And whether or not it would pay in your opinion? A. Yes.

Q. That was done out in California where there were not any meetings of the Board of Directors?

A. Yes.

Q. Did you plan out in your own mind what you were going to do?

A. I presume I did; I do not remember now what I planned. I had been working on the water and power matter for about a year before September 20th, 1911.

Q. There was a motion made with regard to the water, selling some securities of a water company, for \$150,000, and that appears to end the water business; then the next paragraph says that the president then read a paper regarding an electric road to be built as follows (see page 342), and on page 342 there is a three-page typewritten document signed Charles A. Nones; that is the first time that the railroad came before the Board of Directors, wasn't it?

A. Yes.

Q. This report speaks for itself; it is set out, physically attached to the minutes, at page 342, so I will not read it but to call it to your attention I state that it takes up the [176] following subjects: This electric road, and it speaks of our maximum transportation tonnage, has a certain daily capacity; then you go on to state that in the near future we will have to consider the handling of not less than sixty tons daily; then you speak of the cost

(Deposition of Charles A. Nones.)

of doing that, and then you say, I submit the proposition to the board regarding an electric road to be built from San Jose to the furnaces; then you say that there have been several meetings in regard to this matter with residents of the Valley who are unanimously in favor of this undertaking and have so far subscribed in cash about \$10,000, being a donation for which they will receive neither stock nor bonds of the proposed road, and then you say I believe this donation will amount to \$15,000 before the road is built. Then you speak of a right of way, and you say, there has been granted to me personally for about three-quarters of the distance of a private right of way of twenty feet width, and also sufficient land for turnouts and stations, and that the balance of the right of way necessary will have to be acquired from the county and will cost a few hundred dollars. You remember that, don't you?

A. I think it is a mistake; it ought to have been granted to us. Still, it might have been granted to me.

Q. There were certain things you did personally and subsequently were prepared to transfer to the company? A. Yes.

Q. Was not Anderson one of these personal things?

A. Anderson was personal absolutely, and before I gave him a note, which I cannot remember, it is an absolute fact that his obligation was personal. [177]

Q. The note is said to be a personal note?

(Deposition of Charles A. Nones.)

A. I never gave the company note.

Q. You have not a positive recollection?

A. I have not; I do not remember.

Q. You say at the end of this typewritten report, referring to this road, from which I have been reading: "This proposition is worthy of the most serious consideration. I have devoted several months of it, and have obtained the approval of the majority of the property owners whose lands are along the proposed line of railway." So I would assume from the statement that several months prior to the date of that statement you had been giving your attention to that railroad; is that in accord with your recollection? A. That is correct.

Q. There was some corporation formed by Mr. Burnett, wasn't there, an attorney there in San Jose?

A. Yes.

Q. Were any things acquired along that railroad line? A. I think so, Mr. Harby.

Q. Were any things transferred to The Quick-silver Mining Company along that railroad line?

A. No, I think it was all transferred to the San Jose and Almaden Railroad Company; in fact I am positive of it.

Q. What I want to get at is anything that might show that you knew that this thing was being done for a railroad corporation?

A. He was a director, if I am not mistaken, of the San Jose and Almaden Railroad.

Q. You understand, Mr. Nones, that the fact that

(Deposition of Charles A. Nones.)

this railroad in your opinion would make it easier to handle business of The Quicksilver Mining Company and therefore in your opinion would have been of some advantage to The Quicksilver Mining [178] Company and therefore in your opinion would have been of some advantage to The Quicksilver Mining Company, calls for an explanation of your testimony that you secured the services of Mr. Anderson on your personal account and not as an officer of The Quicksilver Mining Company; that is the point of this whole cross-examination; you understand that, don't you? A. Yes.

Q. Well, you understand that it seems to some an anomalous state of affairs that the former president of The Quicksilver Mining Company should appear in this action as a witness on behalf of the company with which he became unpopular, I might say, and then testifies that this man who is now suing the company has no cause of action against the company because that man was personally employed by the former president; that is the anomalous situation, and I would like a full explanation without being prompted?

A. I never asked a man to do any work without paying him for it, and up to within a short time I have always paid what I contracted, and when I agreed to give Anderson \$4,500, I was satisfied that upon my recommendation the company would turn that \$4,500 over to Anderson, but if they did not I would hold myself personally responsible for the amount of money to Anderson.

(Deposition of Charles A. Nones.)

Q. That is to say, you anticipated that if that transaction was placed before the Board of Directors of The Quicksilver Mining Company, they would assume the obligation?

A. Precisely, and if they did not I was willing to, but whether I gave him the \$4,500 more or not I do not remember, and if it should prove that it is in existence it bears out my [179] contention that it was a personal obligation that I assumed, and it is not the first one of its kind that I have been foolish enough to assume.

Q. Now, I want to know whether, in dealing with Mr. Anderson, you dealt fairly with him and let him know that condition of affairs, or whether you concealed from him that you did not have the express authority by resolution of the Board to so employ him?

A. Mr. Anderson knew that I had no authority to dispose of \$4,500 whatsoever.

Q. How could he know that?

A. Because he received the \$4,500, letter from me, explaining the matter.

Q. That was a subject of discussion between you and him? A. I do not know.

Q. Of conference? A. Of conference, yes.

Q. And the result of that was the giving of this letter?

A. The giving of this letter, and if the note is in existence the giving of the note.

Q. At the time that Anderson was doing this work,

(Deposition of Charles A. Nones.)

did that antedate this meeting of the Board of Directors whose resolution I read to you?

A. I could not tell you, Mr. Harby.

Q. Was the work done by Anderson before your typewritten report?

A. It was done before, yes.

Q. And up to the time of the typewritten report that you made the building of this road was not considered by the Board of Directors at all? [180]

A. Oh, yes, it was considered; they had notification of that?

Q. Prior to the making of the typewritten report in 1911?

A. Oh, no, not prior to 1911, but it might have been.

Q. If it was considered by them at all, there is a record of it in the minutes? A. There must be.

Q. And if there was not a record in the minutes, it was not considered? A. Not officially.

Q. Was there any unofficial action?

A. I could not say, Mr. Harby; I do not remember; I may have spoken to them in reference to it.

Q. Have you any recollection of having done so?

A. I cannot place my dates back of 1911.

Q. You have not any recollection of having considered the road with the directors of The Quicksilver Company prior to September, 1911?

A. No, but I think I did.

Q. Why do you think it if you have no recollection?

(Deposition of Charles A. Nones.)

A. For the reason that I must have considered it previous to making the report.

Q. That is a matter of deduction?

A. It is a matter of deduction.

Q. If you did not find anything in the minutes on the subject you would assume that you had not had any official consideration?

A. I should say I had no official consideration.

Q. But you think you may have spoken to somebody individually on the subject?

A. Quite likely.

Q. Have you any recollection of having done so?

A. I have no special recollection of having done so. [181]

Recross-examination by Mr. BLANDY.

Q. If there was received from these property owners the \$4,500, why wasn't it used to pay Mr. Anderson?

A. For the reason that the \$4,500 was only to be paid upon the completion of the road.

Q. Was the road ever completed? A. No.

Q. Never completed? A. Never built.

Q. Never built up to the time of your severing your connection with The Quicksilver Company?

A. No.

Q. What is the matter?

A. I do not know what the matter is; you mean whose fault it was?

Q. Yes, why wasn't it built?

A. I do not know whose fault it was, Mr. Blandy.

(Deposition of Charles A. Nones.)

Q. If it was conceded to be such a good thing and was going to inure to the benefit of The Quicksilver Company, why wasn't it built?

A. I suppose the people who succeeded me did not agree with my ideas.

Q. Yes, I think it was; well, now, then I ask you why it was not built; was it the bankruptcy of The Quicksilver Company? A. No.

Q. Or the insolvency of The Quicksilver Company? A. No.

Q. Or financial troubles that prevented it?

A. No.

Q. Just a change of policy on the part of those who succeeded you? A. I could not tell you.

Q. Oh, yes, you know something about it; you said you did? [182]

A. I do not, Mr. Blandy; pardon me, you are throwing me too many bouquets; you have to be careful about it or I will get a big head after awhile.

Q. I think you have got that already; that is shown on the minutes of this meeting; you were the biggest president I have ever seen. Well, now, coming back to earth, I am really mystified to know why that \$4,500 was not used as it was expected to be used?

A. I could not answer that question, Mr. Blandy.

Q. * * Well, my question to you a moment ago was whether you came upon the scene as a secondary party after Mr. Anderson had done his work and the railroad was abandoned or whether you were the contracting party with him from the beginning; now which was it? A. From what beginning?

(Deposition of Charles A. Nones.)

Q. (The question beginning, "Well, my question to you a moment ago," etc., was repeated to the witness.) A. From the beginning of the railroad.

Q. From the beginning of the employment of Mr. Anderson?

A. Mr. Anderson must have been employed.

Q. I don't care what he must. Answer my question? A. I cannot.

Q. You cannot answer it?

A. It is not intelligible to me.

Q. Is it because of the fault of your intellect or your want of honesty as a witness?

A. No, Mr. Blandy—

Q. You have taken the position on this reference that this claim which Mr. Anderson makes against this Quicksilver Company [183] was not the debt of the Quicksilver Company but was your debt, haven't you? A. I have.

Q. And you mean by that that you personally employed Mr. Anderson to do this work and you personally agreed to pay him, that is what you mean?

A. I became personally responsible.

Q. Now, I put again to you the question—You have said that this was not the debt of the Quicksilver Mining Company but was your personal debt, I ask you whether you personally employed Mr. Anderson to do that work for you?

A. I cannot remember my exact words to Mr. Anderson.

Q. I want to know whether the claim you are making to-day is based on that letter, or on that letter

(Deposition of Charles A. Nones.)

and something else? A. That letter.

Q. All right. Well, you are sufficiently intelligent to appreciate the difference between a debt which one contracts personally and a debt or obligation which one guarantees, aren't you?

A. I do not think there is any difference; I do not think any honest man would think there was any difference. What is the difference whether you contract a debt or whether you guarantee a payment for his services?

Q. A big difference.

A. My morals teach me that there is none.

Q. Your morals are sadly at fault.

A. Possibly, but I prefer them.

Q. You guaranteed for him? [184]

A. To see that the \$4,500, or its equivalent amount was turned over to Mr. Anderson, basing my judgment upon the fact that the directors upon my recommendation would turn that amount over to Mr. Anderson, and if they did not I would pay him myself.

Q. Whose debt were you guaranteeing him?

A. The Quicksilver Company, who were the owners of the majority stock, all the stock of the railroad company.

Q. Then, according to that explanation, Mr. Nones, isn't it perfectly obvious to you that the debt in the first instance was The Quicksilver Company's debt but that you agreed to [185] remain surety for them, or the guarantor for them, and that you were a secondary party?

(Deposition of Charles A. Nones.)

A. I was not a guarantor for them at all; I was guarantor for Mr. Anderson; I cannot be guarantor for two sides.

Q. Whose debt were you guaranteeing the payment of?

A. I was foolish enough to guarantee a man, C. P. Anderson, to receive \$4,500; that is what I was doing; I assumed a foolish obligation so as to see Mr. Anderson succeed in business.

Q. Did you, in all this help, have any personal uses of your own?

A. No, I wanted to build The Quicksilver Mining Company.

Q. Did you have any money of your own at that time? A. Yes.

Q. Where? A. Several places.

Q. But you had no means of living except \$125 a month as president? A. Yes.

Q. What did you have?

A. I do not think I need state.

Q. You certainly will have to.

A. Then you will have to get me on an order.

Q. Now, Mr. Nones, in your schedule in bankruptcy, to which you have referred, you will find that under oath you stated that you were indebted to Mr. Anderson for \$4,500 on a guaranty for work done by him for The Quicksilver Company; is that a true statement?

A. That is correct, yes, decidedly, decidedly.
[186]

(Deposition of Charles A. Nones.)

Redirect Examination by Mr. HARBY.

Q. When you had your talk with Mr. Anderson, was anything said between you as to whether he was to be paid in the event of the road not being finished?

A. I do not remember any such conversation, Mr. Harby.

Q. What I want to get at is whether his employment was contingent upon completion of the road and the payment of that \$4,500 or whether he was to be paid whether or not the sum of \$4,500 was delivered over?

A. Mr. Harby, I believe that Mr. Anderson considered me financially responsible such that if he was willing to accept my personal guarantee that he would get his \$4,500 he did not care where it came from.

Q. That is not the question; there is a road which you were trying to complete and certain people were helping you; now, was your agreement with Mr. Anderson that he was to be paid absolutely and at all events or that he was to be paid only in case the road was built?

A. I guaranteed him absolutely; I made a personal obligation.

Q. You mean you assured him?

A. I assured him personally that he was to receive the \$4,500.

Q. Didn't you say that he was to receive it when The Quicksilver Company received it?

A. The letter which I think, if I remember, Mr. Anderson has states—this is to my best knowledge

(Deposition of Charles A. Nones.)

and belief—that the \$4,500 is to be turned over to Anderson or I guarantee a like amount. I think you will find that in the letter.

Q. That is to say, your recollection of your understanding [187] with him was that in the event of the road being finished and the \$4,500 supplied by the people living along its proposed line being paid to the company, you would see that he would receive that \$4,500 and if the company did not pay it you would? A. I became guarantor.

Q. Did I state your understanding of the agreement between you?

A. Practically, I could not tell you now what my ideas were then, but I became guarantor to Mr. Anderson for \$4,500.

Q. You are not a lawyer? A. No.

Q. You do not pretend to state the legal difference between your undertaking to pay the debt of another upon the failure of the other to pay, or your undertaking to pay a man for services rendered to another, or your undertaking to pay a man for services rendered to another dependent upon certain conditions, do you? You do not undertake to state the legal difference between these propositions, do you? A. No.

Q. I merely want to know if you assume here to understand the legal effect of an agreement, of a contract, where you agree to employ a man for yourself, or whether you employ a man for somebody else and agree to pay him if somebody else does not pay him;

(Deposition of Charles A. Nones.)

are you assuming to express the difference?

A. No, I never considered that side of it.

Q. When you use the words "guaranty" or "guarantor" you are not assuming to use them in their definite meaning that they have in law, are you?

A. No. [188]

Q. Cannot you, without using some quasi legal term, state in plain English just exactly what was done with Mr. Anderson, bearing in mind the fact that you were, at the time you spoke to him and dealt with him, actually the president of The Quicksilver Mining Company, whether or not any resolution had been passed telling you to do what you did do; in other words, what I want to know is, whether you said to Anderson, "You do this work and if my employment of you is not approved by the Board I will pay it personally," or whether you said, "Anderson, you do this work for me individually," or whether you said something else to him.

A. To the best of my recollection and belief, the understanding between C. P. Anderson and myself was, that I guaranteed him the sum of \$4,500 which was the exact amount or the approximate amount, I think, the approximate amount, the residents along the proposed new line had voted; failing in having the \$4,500 paid him I agreed personally to pay him myself; I think I made six statements to that effect.

Q. Was anything stated in the letter, any event stated in the letter, which might prevent him receiving that \$4,500?

(Deposition of Charles A. Nones.)

A. No, because at the time the letter was written I had every idea that the road would be built.

Q. And the \$4,500 become payable then according to the terms of the agreement under which it was put up? A. Yes.

Q. But in the letter you assumed,—you did not have in mind the failure of the road, in this letter?

A. I did not.

Q. Then the thing you had in mind was that The Quicksilver Company might not authorize his employment, wasn't that it?

A. Precisely, and might not authorize the \$4,500; I made that statement before.

Q. While you were president, of course, you know that no action [189] was commenced against The Quicksilver Company?

A. No, there was no action.

Q. None whatever by Mr. Anderson? A. No.

Q. He never presented any bill to The Quicksilver Company for the matters set forth in this complaint in this action while you were president?

A. Never did.

Q. None that you know of?

A. None that I know of.

Q. None came to your personal notice; none came to the New York office that you know of?

A. None that I know of.

Q. And after the time of the alleged performance of these services, you were out in California, were you not? A. I believe so, yes.

(Deposition of Charles A. Nones.)

Q. And on the company's business? A. Yes.

Q. And the office in California continued to be maintained, did it not? A. Yes.

Recross-examination by Mr. BLANDY.

Q. Did Mr. Anderson send a bill to The Quicksilver Company for \$7,411?

A. Never to my knowledge.

Q. Did he so far as you know send any bill to The Quicksilver Company for any amount?

A. I dare say he did; he had expenses which were all paid, to the best of my knowledge and belief.

Q. You said in answer to Mr. Harby's recent question, *fail*- payment I agreed personally to pay him; what did you mean by "failing payment"?

A. Failing for him to receive the payment; his failure to receive the money; his failing to be paid the \$4,500. [190]

Q. You are referring to the \$4,500 contributed by the property owners?

A. Yes; that is the only agreement I made with Anderson.

Q. Was it your understanding that that \$4,500 was put up in trust for the benefit of Mr. Anderson?

A. No.

Q. Was it your understanding that Mr. Anderson had any title to that \$4,500?

A. None whatsoever.

Q. But, Mr. Nones, the question is still open as to who was the employer of Mr. Anderson in connection with this work which he did?

(Deposition of Charles A. Nones.)

A. I cannot tell you, Mr. Blandy; I am going to leave that to the courts; that is what they are going to pass upon.

Q. I fail to appreciate—the fault may be mine—whether Mr. Anderson was employed by you in your individual capacity as a gentleman, quite irrespective of your official position as president—or second, whether he was employed by those who held this \$4,500, or, third, whether he was employed by the Quicksilver Mining Company, the defendant. Now, if you will be kind enough to elucidate that, by telling me by whom he was employed?

A. I could not answer that, Mr. Blandy.

Q. Well, his employment must have been your own debt?

A. I have always considered it as my debt.

Q. What did you mean when, in your schedules, you said that you guaranteed the payment of this \$4,500, which was for services rendered by Mr. Anderson for The Quicksilver Company? [191]

A. I have explained all through, Mr. Blandy; I explained that I became personally responsible for the \$4,500 in case the directors or officers of the company refused to give it to Mr. Anderson; I think I made ten or twenty explanations of that.

Q. But you have already had it explained to you by Mr. Harby that the word “guaranty” presupposes that there was an original debtor and you were secondary in your obligation as guarantor?

A. I know nothing of the law; I simply guaranteed the \$4,500.

(Deposition of Charles A. Nones.)

Q. And you guaranteed him that \$4,500 for his services for The Quicksilver Company?

A. I did.

It is consented that the excerpt from C. A. Nones' bankruptcy schedule "A (3)" "Creditors Whose Claims are Unsecured" be received in evidence as far as the first item on the sheet is concerned, namely, "C. P. Anderson" etc. The schedule was received in evidence and marked Plaintiff's Exhibit 2, March 8, 1915. [192]

Deposition of Margaret A. Bowe, for Defendant.

MARGARET A. BOWE, called as a witness on behalf of the defendant, and being duly sworn by the Commissioner, testified as follows:

Direct Examination by Mr. HARBY.

I am over the age of eighteen years. At one time I was Secretary of The Quicksilver Mining Company; I was secretary from June, 1910, to June, 1913, inclusive. I do not know Mr. Anderson, the plaintiff in this action; he was never here in the New York office of the company while I was secretary. When I was secretary, the head of the office was the president, Mr. Nones; I was there as secretary; there was an office boy. I was also an operator on the typewriter.

I recognize the book (being Defendant's Ex. 1 for Identification) as being the minute-book of The Quicksilver Mining Company under my charge as secretary. It is my writing from here (indicating). Commencing with page 302 of that book I made the

(Deposition of Margaret A. Bowe.)

entries contained therein in my own handwriting at each meeting. The meetings of which minutes are purported to be entered in that book were always held as set forth in the minutes. No minutes were ever written to my knowledge of meetings that were not held. Mr. Nones prepared the minutes; he would dictate to me what to write in the book unless something special came up that I would take.

Q. Did the New York office keep a set of cash-books showing the expenditures of cash?

A. No, it just had a blotter; we kept the amount of the accounts and at the end of the year they were sent to California where the books were kept. [193]

Q. The blotter was never kept in the office?

A. No, went on to Mr. Tatham.

Q. Tatham was the manager at the mines in California? A. Kept the books too,—bookkeeper.

Q. Bookkeeper as well? A. Yes.

Q. There was no regular register showing the moneys received and expended at the New York office? A. No.

Q. Do you know about any moneys being sent to Mr. Anderson?

A. By the Quicksilver Mining Company?

Q. Yes. A. No.

Q. Do you know of any correspondence with Mr. Anderson? A. No.

Q. Was any had to your knowledge while you were in the office? A. No.

Q. You had charge of the correspondence, did you not? A. Yes.

(Deposition of Margaret A. Bowe.)

Cross-examination by Mr. MARSHALL.

I think I became secretary of the Company in June, 1910. The minutes of the meeting appearing on page 302 of the minute-book are the first minutes which were written up by me; that was the election where I was appointed secretary. I believe I heard the matter of the construction of an electric road to connect San Jose with the mine discussed by Mr. Nones with the other directors of the company; I could not fix a date; I should say 1912 but I could not be sure. I do not know what engineer was referred to by Mr. O'Brien; Mr. O'Brien was a director of the company.

Mr. Nones had been in California; he was one time four months away, so there would not be any minutes. I couldn't [194] tell you whether that was the period along through from October, 1911, until March, 1912; I say there was one time he was away four months, but I just couldn't tell you; the notices went out regularly, whether there was a quorum or not.

Q. Did you ever hear of Mr. Swayne going to California, Miss Bowe? A. No.

Q. Do you know of any of the directors who had occasion to go to California on the company's business except Mr. Nones as president of the company?

A. I think not.

Mr. Nones had charge of the office; there should be meetings of the Board of Directors every month. At those meetings Mr. Nones would report what had

(Deposition of Margaret A. Bowe.)

been done concerning the business affairs of the company and the things which had been accomplished would be discussed with the directors. The minutes would state whether Mr. Nones' transactions were approved. I cannot remember any disapproval of any of his executive acts as president.

Redirect Examination by Mr. HARBY.

Q. Were there any reports as to the company's business made at meetings of directors except those appearing in the minutes?

A. Controversies often came up; I cannot remember just what was approved or disapproved; something that comes up is not always approved.

Q. You were asked whether Mr. Nones stated the expenditures made by him and things done by him every month—whether he made statements concerning these things to the Board of Directors. What I want to know is whether the minutes set out the things [195] that he said before the Board of Directors or whether they fail to set them out, during the time that you kept the minutes?

A. What took place at the meeting, if they were recorded?

Q. Yes. A. Surely.

Q. They were recorded? A. Surely.

Q. There wasn't anything that took place at the meetings that you failed to record? A. Never.

Q. Then the statements that he made to the Board of Directors and disclosures concerning anything were made as recorded and not otherwise; is that so?

A. Yes.

(Deposition of Margaret A. Bowe.)

Recross-examination by Mr. MARSHALL.

Q. But you did not attempt to record all the discussions in the various statements which were made by the directors, did you?

A. I took down all I was told to for the minutes.

Redirect Examination by Mr. HARBY.

Q. They correctly state the transactions that took place at these meetings? A. Yes. [196]

Mr. HERRINGTON.—That is the plaintiff's case.

Thereupon, by consent of counsel, it was stipulated that Mr. Jarman of counsel for The Quicksilver Mining Company, if sworn, would testify as follows:

That some considerable time after the change in the management of the Mining Company, in June, 1913, the witness last upon the stand came to him about a balance owing for surveying done for the proposed Almaden railroad; he said he wanted his money and must have it. The mining company owns in Santa Clara County some 7,000 acres of land. The lines are somewhat uncertain; the titles are somewhat uncertain. It is necessary that a survey he had and that an action to quiet title be instituted in order to perfect same. That the president of the company had instructed him to do that work, but for other reasons the matter was delayed. That when in New York he consulted with the president and one of the directors of the Mining Company and advised the company to pay the balance due to Mr. Herrmann for the reason that if he was not paid he

(Deposition of Margaret A. Bowe.)

would become very much dissatisfied and would likely refuse to do the surveying necessary to perfect the title to the company's property; that Mr. Herrmann was a man of some means, of a very determined character and that it would be better for the company to buy his friendship for \$470.50 than to hire a new man; that Mr. Herrmann was a resident of Santa Clara County for many years; was a man of fine reputation and that the company could rely upon his work. Mr. Sexton and Mr. Frank said that they would see about it and after some time Mr. Sexton finally wrote that upon my recommendation they would pay Mr. Herrmann the balance due. [197]

Mr. JARMAN.—The defendant rests.

Mr. HERRINGTON.—That is all.

Mr. JARMAN.—Now, about submitting this matter on briefs. How do you want that done, Mr. Herrington?

The COURT.—Is it the purpose to have the testimony written up, gentlemen?

Mr. JARMAN.—We are quite willing on our part.

Mr. HERRINGTON.—It probably would be better.

The COURT.—Let an order be made that it be written up, each side to pay one-half the expense, the item to be charged as costs and to abide the final determination of the suit.

Mr. HERRINGTON.—That will be satisfactory.

The COURT.—It will be so ordered.

(Deposition of Margaret A. Bowe.)

Thereupon by stipulation of the parties the matter was submitted upon briefs to be filed.

Thereafter, the Court rendered its decision in favor of plaintiff and against defendant, a copy of which is attached hereto and made a part hereof and marked "Opinion." [198]

That since the said judgment in favor of the plaintiff, as aforesaid, said District Court, from time to time, by order duly made, has granted to said defendant extensions of time to and including December 31st, 1916, in which to prepare, serve and file its Bill of Exceptions, to be used on any Writ of Error allowed, the said orders being signed by said Court, and filed herein in the office of the clerk of said court.

The foregoing constitutes all of the proceedings had and all of the testimony offered and received on the trial of said cause.

And now within the time required by law and the rules of this court, said defendant, The Quicksilver Mining Company, proposes the foregoing as and for the Bill of Exceptions as aforesaid, and prays that the same may be settled and allowed as correct.

Dated December 30, 1916.

A. H. JARMAN,

Attorney for Defendant, The Quicksilver Mining Company, a Corporation.

Stipulation That the Foregoing Bill of Exceptions be Settled and Allowed as Presented.

The proposed Bill of Exceptions, and the proposed Amendments thereto, having been duly presented by respective counsel, and same having been

settled and allowed by counsel by agreement, and said amendments having been incorporated in the said Bill of Exceptions within due time—

IT IS THEREFORE STIPULATED AND AGREED that the foregoing Bill of Exceptions is correct; that it contains all of the testimony [199] offered and received, and a correct reference to all the exhibits introduced, and true and correct copies of the material parts of the same, and of all of the proceedings had on the trial of said cause, provided, however:

At the time of the preparation of the within Bill of Exceptions, Defendant's Exhibit 1, namely, the Official Minute-book of The Quicksilver Mining Company, could not be found among the exhibits in said cause in the files of the clerk's office of said District Court, nor has the same since been located or discovered. The excerpts contained in the within bill were taken from what purports to be a copy of a certain portion of said minute-book in the possession of defendant, plaintiff in error herein.

It is hereby stipulated that in the event the said original Exhibit 1, to wit, the said official minute-book of The Quicksilver Mining Company, be discovered, that plaintiff, defendant in error herein, may have corrected any matters or things contained in the within Bill, and purporting to be excerpts from said official minute-book, which may not be in accordance therewith; that is to say, any inaccuracies may be corrected, and in addition thereto, any other or further matters contained in said official minute-book may be presented as plaintiff, defendant in error herein, may desire.

IT IS FURTHER STIPULATED that this Bill of Exceptions, as engrossed, be settled and allowed by Honorable Wm. C. Van Fleet, Judge of said court, in accordance with this stipulation.

Dated January 18, 1917.

B. A. HERRINGTON,
Attorney for Plaintiff.

A. H. JARMAN,
Attorney for Defendant. [200]

Order Settling and Allowing Bill of Exceptions.

The foregoing Bill of Exceptions being now presented in due time and found to be correct by stipulation of the parties, and pursuant to such stipulation I do hereby certify that the said Bill of Exceptions is a true Bill of Exceptions, and that it contains all of the testimony offered and received, and a correct reference to all the exhibits introduced, and a true and correct copy of the material parts of the same, and of all of the proceedings had on the trial of said cause.

Dated February 15th, 1917.

(Sgd.) BENJAMIN F. BLEDSOE,
Judge of Said Court. [201]

**Defendant's Exhibit "A"—Excerpts from S. F.
"Chronicle," April 2, 1913.**

San Francisco Chronicle,
Wednesday, April 2, 1913.

**QUICKSILVER TRUST STOCKHOLDERS
FIGHT CHIEF.**

**Row Over Mine Threatened to Break in Federal
Courts of San Francisco To-day.**

Government Has Books.

**Local Expert is not Allowed to Investigate Famous
Mine Near San Jose.**

A row among the stockholders and directors of The Quicksilver Mining Company, owner of the famous New Almaden Mine between San Jose and Los Gatos, and controlling practically the world's output of quicksilver, has assumed such proportions that it promised, for a short time to-day, to break out in the Federal Courts of San Francisco to-day.

* * *

A Stormy Meeting.

Back of Landers' appointment is the story of a stormy stockholders' meeting held in New York, at which charges of mismanagement were made and the resignation of president, Charles A. Nones, demanded. Nones declined to resign, and although he nominally presided at the meeting, the leadership was wrested from him when he declined to put numerous motions before the meeting. * * *

C. P. Anderson, right of way man for Nones in the promotion of the New Almaden Railroad, which fig-

ures in the charges against the president of the company, said to-night that \$4500 received from the property owners along the proposed [202] line had been returned to them because the guarantee made when the money was placed in escrow in the First National Bank, that the line would be in operation by March 6th last, could not be fulfilled. The rights of way have been extended for six months from March 6th. Anderson understands. He says the Quicksilver Mining Company is behind the proposed road and that it will be built. [203]

Plaintiff's Exhibit 1—Articles of Incorporation of Senonac Power Company.

Plaintiff's Exhibit 1, to wit, a copy of the Articles of Incorporation of the Senonac Power Company of California is in the usual form and is dated March 18, 1912.

The capital stock is Five Hundred Thousand (\$500,000) Dollars, divided into five thousand (5000) shares, of the par value of \$100 each.

The subscribers and incorporators are Charles A. Nones, C. P. Anderson, J. F. Tatham, A. L. Brassy and D. M. Burnett, one share each.

The purposes of the corporation are declared in the second paragraph thereof, to wit:

Second. That the purposes for which it is formed are the following, to wit: To generate, manufacture, purchase and transmit electricity, electrical current, and electrical energy, for the supplying of mines, quarries, railroads, tramways, mills, and factories with electric power, and also for applying of electricity to light or heat mines, quarries, mills, fac-

tories, incorporated cities and counties, and villages and towns, and also for furnishing electricity for lighting, heating or power purposes to individuals or corporations, and to acquire, appropriate, construct, maintain and operate canals, reservoirs, dams, ditches, flumes, aqueducts, pipes and outlets for supplying, storing and discharging water for the operation of machinery, for the purpose of generating and transmitting electricity for any of the above purposes and any and all other purposes: To acquire, construct, purchase, hold, lease, own, maintain and operate all kinds of electrical plants or machinery, and lines for the generation and transmission of electrical current or electrical energy, [204] and to construct, acquire, appropriate, purchase, hold, lease, own and operate and maintain, sell, and let out electric power lines, electric heat lines, and electric light, heat and power lines; and to manufacture, generate, transmit, sell, supply, and otherwise deal in and dispose of electrical current and electrical energy, and to sell, supply, furnish and deliver to the inhabitants of counties, incorporated cities, cities and counties, villages and towns, water, water power, electric lights, heat and power for municipal, domestic, irrigation, mechanical, industrial, and all other lawful purposes, and to appropriate, acquire, construct, maintain and operate ponds, lakes, waters, rivers, creeks, water courses, canals, aqueducts, reservoirs, tunnels, flumes, ditches and pipe-lines, dams, rights of way, water rights of all kinds, and all other property and works necessary or convenient for the catch-

ment, diversion, storage, or distribution of water. To take, acquire, own, handle, sell, lease, hire, mortgage, and encumber lands, tenements and hereditaments. To acquire, purchase, buy, sell, lease, rent, hypothecate and pledge personalty and choses in action. To borrow money, and to mortgage or convey in trust or pledge any of its property for the purpose of securing any indebtedness which it may contract. To loan money and take security for the payment thereof. To buy, sell, deal in, hold and own bonds, debentures and evidences of indebtedness of itself and other corporations, and natural persons and stocks of other corporations and its own stock, and to acquire, own, obtain and use inventions, patents, patent rights, licenses and privileges, and franchises to exercise the right of eminent domain for any and all lawful purposes, and to acquire, own, construct, maintain, operate, and use any and all property of all kinds, including lands, buildings, works, machinery, apparatus, materials, franchise rights and privileges fit, proper, necessary or useful in carrying out any of the purposes of the corporation. [205]

**Plaintiff's Exhibit No. 5—Articles of Incorporation
of San Jose and Almaden R. R. Co.**

Plaintiff's Exhibit No. 5, to wit, a copy of the Articles of Incorporation of the San Jose and Almaden Railroad Company, is in the usual form, and is dated October 13, 1911.

The capital stock is One Hundred and Twenty Thousand (\$120,000) Dollars, divided into twelve hundred (1200) shares of the par value of \$100 each.

The subscribers and incorporators are C. P. Anderson, J. F. Tatham and D. M. Burnett, for one share each, and Charles A. Nones subscribing for 117 shares.

The purposes of the corporation are declared in the second paragraph thereof, to wit:

Second. That the purposes for which it is formed are the following:

To engage in and conduct the business of a carrier of passengers, freight, mail, baggage and express for compensation. To acquire, construct and operate a railroad in the State of California, and to acquire and hold franchises, rights of way, and lands; to construct, maintain and use tracks, side tracks, spur tracks, switches, turnouts, depots, warehouses, car houses, power houses, terminal accommodations, building and repair shops, machinery, wires, wire lines and all structures, appurtenances, appliances, equipments and adjuncts, for the operation of said railroad.

To acquire other railroads, and leasehold and other interests in other railroads, and to operate railroads other than that which is firstly hereinabove mentioned.

To acquire, construct and operate power houses and electrical plants, poles, wires and lines and acquire and have all [206] lands, franchises, rights and privileges for the erection and operation of machinery and appliances for the production, manufacture, use, distribution, and sale of electric motor power, heat and lights and to produce, manufacture, use, distribute, and sell the same.

To sell, convey, alienate, encumber, hypothecate, lease and otherwise dispose of its franchises and property, of every character. To borrow money, execute promissory notes, bonds, and evidences of debt and secure payment of the same by mortgage, deed of trust, pledge or other encumbrance, or transfer of its franchises and property.

To acquire, hold, perfect, sell, pledge, and otherwise dispose of inventions, patents, patent rights, and also shares of the capital stock of other corporations, and generally to have and exercise all the powers, rights, privileges and franchises of a railroad corporation under the laws of California, as now or hereafter existing.

The kind of railroad to be acquired, constructed, operated and dealt with as aforesaid is a commercial railroad for the transportation of passengers, freight, mail, baggage and express, having a standard gauge, and one or more tracks, with all structures, appurtenances, appliances, equipments, accommodations and adjuncts necessary or convenient to the operation of the same. Said railroad to be operated by electricity, gas, or other lawful power.
[207]

Plaintiff's Exhibit 1—Minutes of Meeting of Stockholders of The Quicksilver Mining Co., February 15, 1913.

EXHIBIT REFERRED TO IN DEPOSITIONS.

Plaintiff's Exhibit "1" is a copy of the minutes of the meeting of the stockholders of The Quicksilver Mining Company, held at the office of the Company, 45 Broadway, City of New York, on Feb-

ruary 15, 1913, at 1 o'clock P. M., and contains some thirty-one pages of closely printed matter, most of which is immaterial to any inquiry on this appeal.

The following extracts are sufficient to advise the Court of the nature and character and purpose of the meeting:

“Mr. Charles A. Nones, President of the Company, in the Chair.

Mr. CHAIRMAN.—This looks like a special meeting of the stockholders of the Quicksilver Mining Company. I will read you the report for the year ending December 31st, 1912.

Mr. HARBY.—Before you do that, Mr. President, I move that the meeting be convened and that steps be taken to ascertain what stockholders are present in person or represented by proxy, so that we can ascertain whether we have a quorum present.

The CHAIRMAN.—I do not see any reason for that, Mr. Harby. The meeting was called by twenty-five per cent, ostensibly, of the stockholders, and I do not see that there is anything to do at this meeting except to see what the President has to say.

Mr. HARBY.—Perhaps not, Mr. Nones; but I now make a motion that the President call the meeting to order, and that a Committee be appointed to ascertain what stockholders are here in person or represented by proxies. [208]

A STOCKHOLDER.—I second the motion.

The CHAIRMAN.—Well, the motion is not allowed, as Chairman of this meeting, for this reason—

Mr. HARBY.—I appeal from the decision of the

Chair and ask to have a vote taken as to whether the Committee be appointed.

* * * * *

The CHAIRMAN.—I refuse to put any motion before the meeting.

Mr. HARBY.—Gentlemen, I will put the motion. The Chair has ruled that a Committee be not appointed to examine into the qualifications of stockholders who may be present and to examine into the proxies. We have appealed from the decision of the Chair, and he has refused to put that motion. As a stockholder of record, I put the motion, and I ask you, all those in favor of reversing the decision of the Chair and having such a Committee appointed say aye.

(A chorus of ayes.)

Mr. HARBY.—Opposed?

(No response.)

* * * * *

Mr. HARBY.—I would like to ask if the company obtained a charter for the building of a railroad?

The CHAIRMAN.—No, sir.

Mr. HARBY.—Was anything expended on account of obtaining the charter?

The CHAIRMAN.—Yes, about \$3,500.

Mr. HARBY.—I would like to ask how that was expended?

The CHAIRMAN.—That was expended under direction of counsel, Mr. Burnett, of Wilcox & Burnett, of San Jose. [209]

Mr. HARBY.—For what purpose?

The CHAIRMAN.—For the purpose of obtaining rights of way for the New Almaden & San Jose Railroad, of which the Quicksilver Mining Company owns all the stock.

Mr. HARBY.—This road you mentioned is an incorporated affair?

The CHAIRMAN.—Yes.

Mr. HARBY.—And the stock has been transferred to the Quicksilver Mining Company?

The CHAIRMAN.—Yes, sir.

Mr. HARBY.—But a franchise for the road has not been obtained?

The CHAIRMAN.—It has, but not in the name of the Quicksilver Mining Company; in the name of the New Almaden & San Jose Railroad Company.

Mr. HARBY.—Was anything expended in obtaining that franchise?

The CHAIRMAN.—Not one cent. About three-quarters of it is private right of way; the balance is a public franchise.

Mr. HARBY.—Has anything been done towards the construction of the road?

The CHAIRMAN.—The grades have been cut down.

Mr. HARBY.—To what extent?

The CHAIRMAN.—Possibly \$1,500 or \$2,000 has been spent; I cannot tell you exactly.

* * * * *

The CHAIRMAN.—The percentage of the right of way is mostly over flat land; it has only been the heavy grades which have been cut down. [210]

Mr. HARBY.—Was it a mile or two miles?

The CHAIRMAN.—No, I should say anywhere from a quarter of a mile to three-eighths of a mile of heavy grade.

Mr. HARBY.—Did the directors authorize the expenditure of that \$3,500?

The CHAIRMAN.—They did.

Mr. HARBY.—When?

The CHAIRMAN.—About two years ago, I think.

Mr. HARBY.—Has any report of that been made to the stockholders?

The CHAIRMAN.—It has.

Mr. HARBY.—In your annual report?

The CHAIRMAN.—It has.

Mr. HARBY.—Under what heading have you put it?

The CHAIRMAN.—Under—I think the last year you will find it.

Mr. HARBY.—What do you call it in your report—general or miscellaneous expense?

The CHAIRMAN.—No, I call it Bills Receivable of the Quicksilver Mining Company, and that is part of the Bills Receivable of the Quicksilver Mining Company from the San Jose & New Almaden Railroad; it is the money that the Quicksilver Mining Company loaned to the San Jose & New Almaden Railroad Company, vouchers for which are on hand in San Jose.

Mr. HARBY.—Has the company got a bank account?

* * * * *

A STOCKHOLDER.—May I ask a question?

In asking whether the books of the company are here, does the gentleman mean the Stock Books, or the Business Books of the Company? [211]

A STOCKHOLDER.—I mean both.

Mr. CONBY.—As I understand it, the Stock Books are at the Farmers Loan and Trust Company where the stock is transferred; the business books of the corporation Mr. Nones can tell you about.

A STOCKHOLDER.—That is what I want to clear up; are not these business books here?

THE CHAIRMAN.—No, sir; they are in California, where they have always been kept.

A STOCKHOLDER.—The business books are in California—that is where the principal business of the Company has always been done?

THE CHAIRMAN.—Yes.

THE SAME STOCKHOLDER.—It would be natural that the business books would be kept where the business is actually being done.

ANOTHER STOCKHOLDER.—I do not agree to that at all.

A STOCKHOLDER.—But full extracts and full reports of those business books are sent to the New York office here, are they?

THE CHAIRMAN.—The monthly reports are.

A STOCKHOLDER.—Only the monthly reports?

THE CHAIRMAN.—Yes.

A STOCKHOLDER.—No details?

THE CHAIRMAN.—No, sir.

Mr. HARBY.—Do you not keep duplicate accounts here of what goes on with the Company's property?

THE CHAIRMAN.—We keep monthly accounts of the general operation of the Company.

A STOCKHOLDER.—The Board of Directors meets here, doesn't it?

THE CHAIRMAN.—Yes.

THE SAME STOCKHOLDER.—Can the Board of Directors intelligently pass on the vouchers without having the vouchers before [212] them?

THE CHAIRMAN.—I suppose we may have fifty thousand vouchers in one year.

THE SAME STOCKHOLDER.—What of that?

THE CHAIRMAN.—First of all, we haven't the clerks here to take care of the vouchers, nor have we the room.

THE SAME STOCKHOLDER.—When an item is put down, for example, as an expenditure of, say, \$3,500 for a certain purpose, would it not be natural, if the stockholders are to have information on the point, that they should have the details of the vouchers before them and accessible to them? [213]
EXHIBIT REFERRED TO IN DEPOSITIONS.

Plaintiff's Exhibit 2—Certified Copy of Portion of Schedules in Bankruptcy of C. A. Nones.

Plaintiff's Exhibit 2 is a duly certified copy of a portion of the schedules in bankruptcy of C. A. Nones, as filed in the District Court of the United States, for the Southern District of New York.

That portion thereof, relating to this case, is as follows, to wit:

“Names of Creditors: C. P. Anderson.

Residences: San Jose, California.

When and Where Contracted: San Jose, California,
January, 1911.

Nature and Consideration of Debt and Whether
Any Judgment, Bond, Bill of Exchange,
Promissory Note, etc., and Whether Contract
as Partner or Joint Contractor With Any Other
Person; and if so, With Whom: Guarantee of
Payment for Work Done for Quicksilver Min-
ing Company.

Amount: \$4,500." [214]

EXHIBIT REFERRED TO IN DEPOSITIONS.

This exhibit is the official minute-book of The Quicksilver Mining Company from June 15, 1909, to May 15, 1913. It contains much irrelevant matter to this inquiry. We include only such portions thereof as are relevant to the rights of the parties herein:

Defendant's Exhibit 1—Excerpts from Minute-book of the Quicksilver Mining Company from June 15, 1909, to May 15, 1913.

"ANNUAL MEETING OF STOCKHOLDERS.

New York, June 15th, 1910.

The meeting of the stockholders of The Quicksilver Mining Company was held at the office of said Company, on June 15th, 1910.

Charles A. Nones, President, in the Chair.

The President read the annual report of J. F. Tatham, General Manager, and also of the President.

* * * * *

On motion of Mr. Frank, duly seconded, and

there being no objection, the report of the President and action of the President were accepted and approved.

* * * * * * * *

The hour of two o'clock having arrived, the polls were opened and remained open until three o'clock. The Inspectors and clerk thereupon duly counted the votes and made a report which is as follows, to wit, —Votes cast by A. H. Swayne, G. Frank and C. A. Nones amount to 48,419." [215]

THE QUICKSILVER MINING COMPANY,
ADJOURNED MEETING—July 20th, 1910.

Present—Messrs. Nones, Frank, Benedict, Stern,
O'Brien and Whicher.

The minutes of the previous meeting were read and on motion approved.

The general condition of the mine, at the present time was discussed, and the general policy of the Company was approved.

On motion, adjourned.

M. A. BOWE,
Secretary. [216]

“THE QUICKSILVER MINING CO. AD-
JOURNED MEETING—August 17, 1910.

Present—Messrs. Nones, Frank, Swayne, Stern,
Whicher and Benedict.

The Minutes of the previous meeting were read and approved.

* * * * * * * *

On motion of Mr. Benedict seconded by Mr. Whicher, the following resolution was adopted.

The President is authorized to sell up to 1400 acres of land belonging to the Company, it being understood that whatever sale of property is made all the mineral and other rights would be reserved to the Company.

The lands under consideration do not comprise the best lands owned by the Company and the President is authorized to fix a minimum price of not less than \$65 per acre for these lands which is approximately the value of same. It is possible that a better price may be realized. * * * "

**"THE QUICKSILVER MINING COMPANY
SPECIAL MEETING—September 7th, 1910.**

A special meeting of the Board of Directors of the Quicksilver Mining Co. was held on the above date at 2:30 P. M.

Present—Messrs. Nones, Frank, Stern, Benedict, Whicher, Blochley and O'Brien.

On motion, the minutes of the previous meeting were not read.

The President having returned from a visit to the mine, read a report as to conditions, and

On motion of Mr. Whicher, duly seconded by Mr. O'Brien, the following resolution was adopted. The President is hereby authorized to sell up to 1250 acres of land as designated by [217] him, at to-day's meeting, at the price offered, to wit—\$45.00 per acre, and that in making this sale he is further authorized to obtain the necessary abstract of title on all such lands as conditioned. It is understood that a commission not to exceed 5% is to be paid when deed is passed, and amount of sale is received.

On motion of Mr. O'Brien, seconded by Mr. Whicher the following resolution was also adopted. The President was authorized to sell 25 acres of land to a man named Caseli for \$2000 net.

On motion the meeting adjourned.

M. A. BOWE,
Secretary."

"THE QUICKSILVER MINING COMPANY
POSTPONED MEETING—September 22d,
1910.

Present—Messrs. Nones, Frank, Swayne, Stern,
Benedict, Whicher, Blochley and
O'Brien.

The minutes of the previous meeting were read and approved.

On motion of Mr. Whicher, seconded by Mr. Stern, the following resolution was adopted. The President is authorized to make a sale of 800 acres, or thereabouts, of land, as presented, at to-day's meeting, under the advice and direction of the Company's counsel, and the contract as read is to be made a part of the minutes of this meeting; he is also authorized to sell 25 acres of land to a man named Caseli.

On motion of Mr. O'Brien, seconded by Mr. Stern, the President was authorized to make contract for the rebuilding of No. 3 furnace." [218]

“ADJOURNED MEETING THE QUICK-SILVER MINING COMPANY—November, 16, 1910.

Present—Messrs. Nones, Frank, Swayne, Stern, Whicher, Blochley, O’Brien, Cole and Mr. Aaron, the Company’s counsel.

On motion, duly made and approved, the sale of approximately 25 acres of land to a man named Caseli was rescinded.

On motion duly made and seconded, the following sales were confirmed and ratified.

Sale of 26.03 acres *fo* Elia Girogi for the sum of \$2,000, of which \$1,200 is cash, and the balance represented by Mortgage of \$800 due one year from date of sale, at 6% interest.

Sale to Henry Schumann, 190 acres for \$6,500.

Sale to Annie Gilleran (widow) 25 acres for \$1,250 Rancho Capitancillos.

(All papers pertaining to sales attached herewith.)

Also sale of 1012 69/100 acres to Messrs. W. S. Clayton, A. H. Marten, A. R. Chace, and E. Schillingsburg, as per contract herewith attached.

At a meeting held on September 22, 1910, the President was authorized to close contract with Mr. Scott for the rebuilding of No. 3 furnace at a cost of \$7,800. When the President was at the mine in October, 1910, he arranged with other parties for the rebuilding of No. 3 furnace at a cost not to exceed \$4,500.

* * * * *

The President reported to the Board of Directors

the advisability of selling tracts of lands embracing 260 acres, being part of Rancho San Vincente, and adjoining to the South property [219] sold to Messrs. W. S. Clayton, A. H. Marten, J. R. Chace, and E. Shillingsburg, and approximately 100 acres being part of Rancho Capitancillos, and adjoining to the north and east property belonging to Annie Gilleran, at prices respectively at not less than \$75. per acre for Rancho San Vincente, and \$60. per acre for Rancho Capitancillos—it being the opinion of the directors that it is best to dispose of lands of the Company, not needed for mining purposes.

On motion of Mr. Blochley, seconded by Mr. Whicher it was resolved that the President be authorized to sell the property as outlined above."

* * * * *

NOW THEREFORE be it resolved that Charles A. Nones, the President of this corporation and M. A. Bowe, the Secretary of this corporation, be and they are hereby authorized, empowered and directed to make, execute and deliver to the said W. S. Clayton, A. H. Marten, J. R. Chase and E. Shillingsburg, a good and sufficient deed conveying to them the said property in the name of this corporation, under it a corporate seal and as its corporate act and deed which is in the words and figures following, to wit: * * * "

The minute-book shows that the regular monthly meeting of the directors, called on December 14, 1910, was postponed as the president was leaving for California, and that thereafter no meetings of the board of directors were held until March 22, 1911. [220]

**“THE QUICKSILVER MINING COMPANY
SPECIAL MEETING—March 22, 1911.**

Present—Messrs. Nones, Frank, Swayne, Stern,
Blochley, O'Brien and Moyer.

On motion, the reading of the minutes of the previous meeting were dispensed with.

On motion, duly approved, the sale of ten (10) acres at \$150 per acre to John Mondragon was ratified and confirmed; also sale of 153.98 acres to Ellen A. Bowles and George W. Bowles for \$7,000; also sale to Henry Schumann for \$1,500.

On motion of Mr. Swayne, seconded by Mr. O'Brien, it was moved and approved that the matter of dealing with the Eureka Company be left to the President with power to act.

On motion, duly made and approved the board ratified and confirmed the action of the President concerning a water contract entered into between the Quicksilver Mining Company and the County of Santa Clara, State of California, and dated February 21, 1911.

The reports of the mine for the month of February were read.

Meeting adjourned until March 24, 1911.”

“Regular Monthly Meeting, April 12, 1911.

Present: Messrs. Nones, Frank, Swayne, Stern,
Whicher, Blochley and O'Brien.

Reading of previous meeting read and approved.

The president read a letter which he had received regarding the “paint” matter and moved that Mr. Whicher employ the services of an expert to investigate this paint matter and report at next meet-

ing. This motion was duly seconded. [221]

The President was authorized to negotiate for the purchase of an Aerial Tram, a second-hand one, at a cost not to exceed \$1,500.

The President was also authorized to confer with our attorney, Mr. Aaron, with reference to changing the fiscal year from April 30th to December 31st.

The matter of repairs to the large house was discussed and the President is to submit at next meeting approximate cost of repairs.

The resignation of Mr. J. H. Benedict was read and accepted.

On motion, meeting adjourned."

**"SPECIAL MEETING THE QUICKSILVER
MINING COMPANY—June 5, 1911.**

Present—Messrs. Nones, Frank, Swayne, Whicher, O'Brien, Blochley and Stern.

On motion of Mr. C. A. Nones and seconded by Mr. Whicher, the date of the fiscal year was changed from April 30th to December 31st. The annual meeting to take place as stated in the charter and By-Laws of the Company.

On motion of Mr. Swayne duly seconded by Mr. Whicher, the President was authorized to have Mr. Aaron, the Company's counsel, prepare a Resolution re. California Power Company, to be submitted to the Directors at the next meeting.

On motion, duly seconded, Messrs. Nones and Whicher were appointed a committee of two to see Mr. Aaron regarding the Paint situation and report at the next meeting of the Board. [222]

The President was authorized to prepare the an-

nual report in such form as he deemed advisable.

The President reported that the cost of rebuilding No. 3 furnace was \$4,884.20 instead of \$4,500, as voted, and on motion of Mr. Whicher, duly seconded, the total cost was approved."

**"THE QUICKSILVER MINING COMPANY
ANNUAL MEETING OF STOCKHOLD-
ERS.**

New York, June 21, 1911.

The annual meeting of the stockholders of The Quicksilver Mining Company was held at the office of the Company on June 21st, 1911, at 1 P. M., and in accordance with the By-Laws of the Company, Chas. A. Nones, President, presided as Chairman.

The Chairman read the annual report of Mr. J. F. Tatham, Treasurer and General Manager, and also of the President, and on motion of Mr. Hollinger, seconded by Mr. Velsor, all acts of the officers and directors of the Quicksilver Mining Company during the past year, were ratified and confirmed.

* * * * *

At 2 o'clock P. M. the Chairman announced that in accordance with the By-Laws the annual election of directors would then be had. An election of eleven directors of The Quicksilver Mining Company to serve for the ensuing year was then held and the result of the election is shown by the following certificate.

New York, June 21, 1911.

We, the undersigned, hereby certify that at the annual election of The Quicksilver Mining Com-

pany held this day, there were represented in person, or by proxy, 41,619 votes, and each of the following named, having received the whole number of votes [223] cast, namely 41,619, were duly elected directors in accordance with the By-Laws—A. H. Swayne, G. Frank, C. A. Nones, B. F. Cole, C. A. Stern, L. E. Whicher, J. B. O'Brien, A. E. Blochley, J. F. Tatham, Edwin Palmer, M. A. Bowe.

(Personally signed)

CHRISTOPHER C. SLEESMAN,
JOHN JOS. COWLEY,

Inspectors of Election."

"New York, Sept. 20th, 1911.

SPECIAL MEETING BOARD OF DIRECTORS
THE QUICKSILVER MINING CO.

Present—Messrs. Nones, Frank, Swayne, Whicher,
Blochley, O'Brien, Cole and M. A.
Bowe.

Minutes of previous meeting read and approved.

The president read the following paper on the
"Paint" situation:

PAINT.

Mr. Blochley advises me that a certain expert connected with the Standard Oil Co. as chemist, is of the opinion that our paint is a first-class article and can be disposed of at from \$28 to \$32 per ton allowing liberal charges for ingredients and a freight rate of \$8 per ton from the Pacific Coast to Atlantic Seaboard, and other incidental costs. This paint can be put in New York at a cost not to exceed \$15 per ton.

During my stay out West I carefully considered

the different items embracing the cost of the plant and found that we can use many pieces of machinery that we have on hand and are not now being used, and no chance of any use being made of same in the future. The total cost of this plant will not exceed the sum of \$8,000 and will grind and finish 40 tons of paint of daily. [224]

Mr. Smith, of Messrs. Smith, Emery & Co., advises me that he can obtain the services of a first-class superintendent, who understands the business, at a yearly salary of \$1,500.

I advise that this party's application be considered, as a recommendation from Smith, Emery & Co. entitled a man to more than careful consideration.

I have given orders to finish 150 lbs. of the slag and to have same made into paint, which I believe has been done by this time, and it is my intention to have our buildings painted with same so as to test the value of this article both in wet weather as well as dry.

(Personally signed)

CHAS. A. NONES,

President.

—and on motion of Mr. Swayne, seconded by Mr. Whicher, the president was authorized to expend not more than \$8,000 for the erection of the paint mill, and to take such steps as might be necessary, under the advice of our counsel, for the formation of a company to conduct such business with the understanding that all of stock is the property of the Quicksilver Mining Company. Motion carried.

The following paper was read regarding furnaces and was approved by the Board. (See page 338.)

The President then read a report on Water conditions (see page 339), and on motion of Mr. Whicher, duly seconded, it was resolved that the officers of the company be authorized to transfer to the California Power Company all the water rights owned by the Quicksilver Mining Company, together with a lease of the pipes of the county of Santa Clara, said lease being for a term of fifty (50) years and in exchange therefor to receive all stock and other securities of the California Power Co.

FURNACES.

Nos. 1 and 8 are closed down for repairs. We are now [225] burning 83 tons instead of 140 tons our usual amount.

#1 Furnace has about 250 Tiles broken and I noticed it was not roasting thoroughly; also the condensers are in bad shape requiring new cement work and fire bricks. I ordered the amount of tiles necessary, at a cost of \$1.35 per tile, and although this work will cost us in the neighborhood of \$1,500 and will take about a month to complete, it will nevertheless pay us to put this furnace in first class condition as it handles the best run of our large ores. This furnace has not been repaired for something like 15 years.

#8 is closed down for about 2 weeks for repairs and will cost \$600 to 800. This furnace also needs new tiles and cement work, and when repaired these furnaces will last for a long time without any further repair work.

To pay for these improvements, the condensor walls of #1 have been scraped, from which operation we recovered 29 flasks of silver. Up to the time of my leaving, #8 condensers had not been scraped, but I believe we will recover fully 40 flasks from both these furnaces, which could only have been obtained by closing same down.

(Personally signed)

CHAS. A. NONES,

President.

WATER.

Owing to the contract which we have with the county, it entitled us to lease all pipes for a term of 50 years from date we elect to lease same, subject to a donation of 100,000 gallons of water per day to the county. I recommend that as soon as these pipes are properly installed that this company notify the county of its intention to lease said pipes and this company should then transfer to the water company which is now in existence all of the water rights receiving in payment therefor all the stock of the [226] water company.

My reason for this recommendation is as follows: We can undoubtedly connect with not less than one hundred users along the present line of pipes, and my reason for this estimate is that one of the supervisors advised me that when the county entered into its last contract with us, it disconnected upwards of 40 users of water who had unlawfully connected with the county pipe. The laws of California state that a company may charge \$12.50 for each party connected with the main line, and the rate now being

charged for water by the San Jose Water Co. is 25 cts. for the first 10,000 gallons, and 20 cts, for *ever* 10,000 gallons thereafter.

We have adverse possession to 3,000,000 gallons water per days, and although we could not supply this amount during the dry season without building another dam, we nevertheless can supply between 1,300,000 gallons and 1,700,000 gallons water per day, as the water supply was gauged during the entire month of August and showed this amount going through the reservoir pipe.

In all these calculations for supply the water is first passed over the service wheels and is there transferred into power, after which it is then used for household and other purposes.

The San Jose Water Co. own every stream in the Santa Clara valley outside of the Alamitos. This is the stream to which I refer and which we have carefully safeguarded in all of our property sales. It is the only stream of commercial value upon our property, and it is my opinion that outside of receiving a small return from the consumers, possibly \$3,000 or \$4,000 per year, the San Jose Water Co. knowing that if a dam of sufficient depth were built upon our property it would store up sufficient water to supply 10,000,000 gallons of water per day; that they would then [227] rather buy our rights at more than a fair price, allowing us to retain the power privileges than to run the chance of our be-

coming competitors against them in the water supply business.

(Personally signed)

CHAS. A. NONES,
President.

On motion of Mr. Whicher, duly seconded, and approved, the following motion was ratified that—

The President is therefore authorized to sell and transfer these securities at a price of not less than One Hundred and Fifty Thousand Dollars (\$150,000.00) in cash or its equivalent, reserving however, to The Quicksilver Mining Company the right for all power to carry on its business now and in the future and for not less than 200,000 gallons of water per day.

(Personally signed)

M. A. BOWE,
Secretary.

The President then read a paper regarding an Electric Road to be built as follows (see page 342), and on motion of Mr. Whicher and seconded, it was resolved that before taking action on an electric road to be built from San Jose to the mine, that the President furnish a complete specification showing itemized costs, possible earnings, etc., to be submitted at a future meeting of the Board. Mr. O'Brien stated that he knew a competent engineer who could furnish such a report, and he was requested to engage same.

Our maximum transportation tonnage has a daily capacity of not in excess of 20 tons, which we haul

7 $\frac{1}{2}$ miles at cost of 60 2/10 cts, per ton. For this service we were paying last year \$1.25 per ton, and this saving has been effected by ownership of our teams. All of which has been paid for.

In the near future, we will have to consider the handling of not less than 60 tons daily and possibly 100 tons. We have [228] reduced the cost of transportation as low as can be done so that an increased tonnage will force us to purchase additional teams, and will permit of no saving. Our calculations of hauling is based on 6 horses for every 8 tons.

Only hauling 60 tons daily would cost us about \$37.00 or about \$12,000 per year. In addition to this amount, we are constantly paying for the hauling of our groceries from San Jose to the mine, and we haul about 25 tons monthly, at a cost of about \$4.00 per ton. Our entire hauling charges and feed bills amount to about \$15,000 per year.

I submit the proposition to the Board regarding an Electric Road to be built from San Jose to the Furnaces. There have been several meetings on this matter with the residents of the Valley, who are unanimously in favor of this undertaking, and have so far subscribed in cash about \$10,000. This being a donation for which they will receive neither stock nor bonds of the proposed road. I believe that this donation will amount to \$15,000 before the road is built.

Besides there has been granted to me personally, for about $\frac{3}{4}$ of the distance of a private right of way of 20 ft. width, and also sufficient land for turnouts

and stations. The balance of the right of way necessary will have to be acquired from the county and will cost a few hundred dollars.

I am of the opinion that if a company were formed to operate and build this line that the line could be built by a certain contractor with whom I have talked in San Jose, upon the following terms:

Original cost of road would not exceed \$110,000, to which would be added 10% for profit, and for this the contractor would receive 6% bonds of this Railroad Co., less amount of cash [229] donated by residents. Said bonds to be guaranteed principal and interest by the Quicksilver Mining Co.

The cost of hauling our own freight over this line this way would be very small. A 40-ton car as a trailer could be attached to any regular passenger car without further charge, and in addition to our saving for transportation, which will be in the neighborhood of over \$15,000 per year, we would also be able to carry passengers, haul freight and express packages for residents along the line.

A close calculation of the population between San Jose and Almaden gauging the same for a distance of a mile east and west along the proposed line shows about 5000 people also three schools with a daily attendance of 150 scholars.

Also beg to call your attention to the benefits accruing to us from this electric road. Our acreage along the proposed lines is composed mostly of hills which are nothing but grazing lands and worth not over \$20 per acre. Should this line be built these hills

would be desirable building sites, we retaining our mineral rights, as has been the case in similar localities, to wit, Los Gatos and Saratoga, two places which are situated from 6 to 7 miles of our property.

We also own 128 acres of land along the proposed line which we could not sell for \$48 per acre for agricultural purposes last year. This land is finely situated for a townsite, and although we have sold 10 acres at \$110 per acre, we still have sufficient left to warrant setting out this land in $\frac{1}{2}$ acres plots which could be sold easily at \$150 per $\frac{1}{2}$ acre plot.

This proposition is worthy of the most serious consideration. I have devoted several months to it, and have obtained the approval of the majority of the property owners whose lands are along the proposed line of railway.

(Personally signed)

CHAS. A. NONES,

President. [230]

The regular monthly meeting called for October 11, 1911, was adjourned because no quorum was present, and thereafter no meeting of the Board of Directors was held until March 18, 1912, because of a want of a quorum at each of the regular monthly meetings.

“Mar. 18, 1912.

“THE QUICKSILVER MINING COMPANY.

Special meeting of the Board of Directors, Present—G. Frank, A. H. Swayne, C. A. Stern, L. E. Whicher, A. E. Blochley and M. A. Bowe.

On motion of Mr. Swayne, duly seconded, the resolution adopted by the Board of Directors at a special

meeting held at the company's office, No. 45 Broadway, New York, on Sept. 20th, 1911, regarding the sale of the company's water rights was rescinded at to-day's meeting, and on motion of Mr. Whicher, and seconded by Mr. Swayne, the following resolution was adopted in its place:

"Resolved that the officers of the company be authorized to transfer to Senonac Power Company, all the water rights owned by the Quicksilver Mining Company, together with a lease of the pipes of the county of Santa Clara. Said lease being for a term of fifty (50) years, and in exchange therefor to receive all stock and other securities of the Senonac Power Company, and the President is therefore authorized to sell and transfer these securities at a price of not less than Two Hundred Thousand Dollars (\$200,000.00) in cash or its equivalent, reserving, however, to the Quicksilver Mining Company, the right for all power to carry on its business now and in the future, and for not less than 200,000 gallons of water per day.

(Personally signed)

M. A. BOWE,

Secretary.

On motion, meeting adjourned." [231]

"SPECIAL MEETING OF THE BOARD OF
DIRECTORS OF THE QUICKSILVER
MINING COMPANY—May 1, 1912.

Present—C. A. Nones, G. Frank, C. A. Stern, A. H.
Swayne, B. F. Cole, L. E. Whicher, A.
E. Blochley and M. A. Bowe.

On motion the reading of the minutes of the pre-

vious meeting were dispensed with.

Moved and approved that the President's action in ordering the sum of approximately \$3,000, to be charged to March expenses, said sum representing the amount of money actually expended upon right of way, surveys and cutting down grade for the proposed San Jose and Almaden Road, all of which stock will be owned by the Quicksilver Mining Company.

Further resolved that the President's action be approved in receiving the stock for account of The Quicksilver Mining Company from the San Jose & Almaden Road for the full amount of these expenses."

"May 10, 1912.

"Adjourned meeting of Directors of the Quicksilver Mining Co. Present: Chas. A. Nones, G. Frank, A. H. Swayne, C. A. Stern, L. E. Whicher, A. E. Blochley, E. F. Coles and M. A. Bowe.

That the Quicksilver Mining Co. shall lease to Chas. J. Vath and C. P. Anderson for a term of eighteen months commencing April 1, 1912, at a monthly rental of \$160, payable on the 10th day of each and every month, with the privilege of a renewal by the parties leasing for an additional 3½ years, at a monthly rental of \$200, and a further privilege by the parties leasing for an [232] additional 5 years at the same rate. All other terms of sale and agreement being the same as approved May 1, 1912.

On motion duly made and seconded the sale of 92.40 acres to A. L. Brassey for \$6,770, also sale of about 2½ acres to Hacienda School District for \$500,

were approved and confirmed.”

“THE QUICKSILVER MINING COMPANY,
ANNUAL MEETING OF STOCKHOLDERS
—New York, June 19, 1912.

The annual meeting of stockholders was held at the office of the company on June 19th, 1912, at one P. M., and in accordance with the -By-laws of the company, Chas. A. Nones, President, presided as Chairman. The Chairman read the annual report of Mr. J. F. Tatham, Treasurer and General Manager, and also of the President, and on motion all acts of the officers and directors of the Quicksilver Mining Co. during the past year were ratified and confirmed.

We, the undersigned, hereby certify that at the annual election of the Quicksilver Mining Co. held this day, there were represented in person or by proxy, 60,309 votes, and each of the following named, having received the whole number of votes cast, namely, 60,309, were duly elected directors in accordance with the by-laws. Chas. A. Nones, A. H. Swayne, C. A. Stern, B. F. Cole, L. E. Whicher, A. E. Blochley, J. F. Tatham, D. M. Burnett, S. Y. Baylis, Martin Conboy and M. A. Bowe.

(Personally signed)

JOHN J. COWLEY,
C. C. SLEESMAN,
Inspectors of Election.

(Personally signed)

CHAS. A. NONES,
Chairman.”

That no regular meetings were had of the Board of Directors between June, 1912, and December 12, 1912, because of a lack of a quorum of the Board of Directors. [233]

“Dec. 12, 1912.

REGULAR MONTHLY MEETING OF THE
DIRECTORS OF THE QUICKSILVER
MINING CO.

Present—C. A. Nones, A. H. Swayne, L. E. Whicher,
A. E. Blochley, S. Y. Baylis and M. A.
Bowe—also Mr. Martin Conboy, the
company's attorney.

Reading of minutes of previous meeting dispensed with by roll call. Voting aye on above resolution—A. H. Swayne, L. E. Whicher, S. Y. Baylis, A. E. Blochley, M. A. Bowe, C. A. Nones.

The President then made the following statement: Having been informed that a number of stockholders desire a special meeting and recognizing the rights of all stockholders, I move that the following resolution be unanimously adopted—That a committee consisting of Messrs. A. H. Swayne, S. Y. Baylis and C. A. Nones, working in conjunction with the attorney for the company, Mr. Martin Conboy, of Messrs. Griggs, Baldwin & Baldwin, be appointed to investigate a request purporting to represent more than one-quarter interest of stockholders and that pursuant to the by-laws of this company, upon investigation of this statement should same be verified, that a special meeting of stockholders be called. Resolution adopted by a unanimous vote. On roll call voting

aye on above resolution—A. H. Swayne, L. E. Whicher, S. Y. Baylis, A. E. Blochley, M. A. Bowe, C. A. Nones.

Mr. M. E. Harby then presented to the Board of Directors a request for the calling of a special meeting of the stockholders of the company to act upon the general business of the company representing to be signed by over one quarter interest of stockholders of the Quicksilver Mining Co., and signed by various persons on four (4) separate sheets, as follows:

* * * * *

[234]

Mr. Whicher requested from the President, a statement of the affairs of the company since the annual report which was made as of December 31st, 1911. The President stated that the reports were not complete on account of Mr. Tatham's absence on a vacation, and that the October and November statements had not been received, but that they had been telegraphed for and they would undoubtedly be received within a day or so. * * * "

"ADJOURNED MEETING BOARD OF DIRECTORS, THE QUICKSILVER MINING COMPANY—December 18, 1912.

* * * * *

* * * and that a special meeting of all stockholders be called on the second Wednesday in February, 1913, and on motion of Mr. Swayne and seconded by Mr. Baylis, the following resolution was adopted. * * *

On motion of Mr. Baylis and seconded, the resignation of Mr. John Drew as manager of the mine was accepted.

* * * * * * * *

[235]

“January 8, 1913.

Regular monthly meeting adjourned. Lack of quorum.

(Personally signed.)

M. A. BOWE,
Secretary.

February 11, 1913.

Regular meeting called February 11th in place of February, 12th, at 3:30 P. M.

Present—C. A. Nones, M. A. Bowe, J. F. Tatham.

Mr. Tatham having come on from California to present the annual report to the Board of Directors and to report on any matters concerning which the Board might desire information.

There being no quorum, the meeting adjourned.

(Personally signed)

M. A. BOWE,
Secretary.

February 18th, 1913.

Special meeting of the Board of Directors held at the office of the Company at 3:30 o'clock P. M.

Present—C. A. Nones, A. H. Swayne, B. F. Cole, A. E. Blochley, S. Y. Baylis, M. A. Bowe, and Mr. Conboy, the company's attorney.

Whereas at the special meeting of stockholders of The Quicksilver Mining Company, held on Febru-

ary 15th, 1913, the following Resolution was adopted:

And whereas the directors on consideration of said Resolution find it advisable for the best interests of the corporation to investigate the books of accounts of the corporation at the place where its business is conducted thereby not suspending its operation during the period while such books and vouchers are under examination, and [236]

Whereas the directors in an effort to comply with the spirit of said Resolution inasmuch as they provide for an examination of the Company's books of accounts and of its physical properties are desirous to have such examinations made in the most practical manner and with the least interference in the conduct of the company's business, now further.

Resolved that the Secretary communicate with the Committee referred to in said resolution, as follows:

1. Inquire for what period the examination of the books of account and vouchers is to cover in order that a starting point for such investigation may be determined by the committee.
2. Suggest the appointment of California representatives of some firm of Certified Public Accountants in the City of New York, such for instance as—

Haskin & Sells,

Price, Waterhouse & Co.,

Marwick Mitchell Peat & Co.,

Suffern & Son.

to make an examination of the books, vouchers, etc., at the office of the Company at New Almaden, Calif., where its business is conducted, for the period fixed by the aforesaid committee.

3. Suggesting the appointment of a competent mining engineer to examine and make a report upon the mines and other physical properties of the corporation and during the period while the examination of the books is being conducted.
4. Requesting the committee to give such instructions to the accountants and engineers respecting the particular features of the investigation that they desire definite and specific information upon.
5. Requesting said committee to inform the directors that part, if any, of such expenses of such investigations should be borne by the corporation, inasmuch as respective resolutions make no provision for the payment of said investigations.

On motion, meeting adjourned.

(Personally signed)

M. A. BOWE,
Secretary." [237]

Defendant's Exhibit No. 2—Annual Report of the Quicksilver Mining Company, for the year 1909–1910, etc.

EXHIBITS REFERRED TO IN DEPOSITIONS.

Defendant's Exhibit "No. 2" is the printed Annual Report of The Quicksilver Mining Company

for the year 1909–1910, and purports to be a review of the operations of the Company for the fiscal year ending April 30, 1910.

It also sets forth the Annual Report of J. F. Tatham, General Manager, and a financial statement of the Company's affairs for the year submitted to the stockholders by Charles A. Nones, President.

This report deals with the Company's affairs but apparently has no relevancy to any question involved on this appeal. [238]

Defendant's Exhibit No. 3—Excerpts from Printed Annual Report of Quicksilver Mining Company for 1910–1911.

EXHIBIT REFERRED TO IN DEPOSITIONS.

Defendant's Exhibit "No. 3" is the printed Annual Report of The Quicksilver Mining Company for the year 1910–1911, and purports to cover the Company's affairs for the fiscal year ending April 30, 1911.

This report contains a general statement of the financial affairs of the Company for the fiscal year. It is not itemized and there is no memorandum therein referring to or concerning plaintiff in any manner, or to any other matter connected with his cause of action, or his right to recover herein.

The report is submitted by Charles A. Nones, President, and contains the financial report and report of the Company's mining property submitted by J. F. Tatham, Treasurer and General Manager. [239]

**Defendant's Exhibit No. 4—Excerpts from Printed
Report of the Operations of the Quicksilver
Mining Company, etc.**

EXHIBIT REFERRED TO IN DEPOSITIONS.

Defendant's Exhibits "No. 4" is a printed report of the operations of The Quicksilver Mining Company for a period of eight months from April 30, 1911, to and including December 31, 1911.

Among other things it includes the report of Charles A. Nones, President. That part relevant to this case is as follows:

"The change in the fiscal year was made so as to permit the closing of our books at the end of each calendar year, thus conforming to the regulations of both the Federal and State laws, and at the same time eliminating the necessity of again opening and closing our books so as to render our stockholders a report as of April 30 of each year. * * * We were prevented from making a larger production for the eight months covered by this report on account of the lack of transportation facilities. This I expect to overcome as this Company has within the last few months obtained the necessary rights of way and franchises for an electric line to be owned entirely by your Company and which will extend from San Jose to the town of New Almaden, where the furnaces are located. By this means we will be able to save considerable cost in our transportation and at the same time it will be possible for us to increase our hauling facilities, thereby also increasing our production. This proposed line

will also transport passengers and express matter for the adjacent territory. [240]

Another benefit arising from the construction of this line will be the opening up of our lands, most of which can be developed and sold at a far higher price than would be obtained were this road not in operation.

I also beg to report that negotiations are now pending for the sale of the water rights belonging to this Company at a price that will give this Company a large working capital for whatever future developments may be contemplated.

I also wish to advise you that your directors have authorized the building of a paint mill with a capacity of 20 tons per day. This mill will be one of the by-product divisions of your Company, for the use of waste after the quicksilver has been thoroughly extracted therefrom and mixed with some ingredients under a certain process will make as good, if not a better, metallic paint than can be found on the market at present. This company will be able to manufacture this paint at a very low cost and at the present market prices will be able to make large profits.

Respectfully submitted,

CHARLES A. NONES,

President."

The report also includes the general financial statement of the Mining Company during that period, as submitted by J. F. Tatham, treasurer and general manager.

Nothing that appears in the financial statement,

as submitted by the treasurer and general manager, relates or refers to the plaintiff or his cause of action sued upon herein. [241]

Defendant's Exhibit No. 5—Excerpts from Printed Report of Operations of Quicksilver Mining Company.

EXHIBIT REFERRED TO IN DEPOSITIONS.

Defendant's Exhibit "No. 5" is a printed report of the operations of The Quicksilver Mining Company for a period of twelve months from December 31, 1911, to December 31, 1912.

This report contains a general statement of the financial affairs of the Company for the year. It is not itemized and there is no memorandum therein referring to or concerning plaintiff in any manner, or to any other matter connected with his cause of action, or his right to recover herein.

The report is submitted by Charles A. Nones, President and contains the financial report, and the report of the company's mining property submitted by J. F. Tatham, Treasurer and General Manager. [242]

Defendant's Exhibit No. 6—Charter and By-laws of the Quicksilver Mining Company.

EXHIBIT REFERRED TO IN DEPOSITIONS.

Defendant's Exhibit "No. 6" is a copy of the Charter and By-Laws of The Quicksilver Mining Company, incorporated by the State of New York, April 10, 1866, with a capital stock of ten million dollars, divided into one hundred thousand shares of the par value of \$100 each.

The Act incorporating the company is as follows, to wit:

“CHAPTER 470.

AN ACT TO INCORPORATE THE QUICK-SILVER MINING COMPANY.

Passed April 10, 1866.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1: Samuel G. Arnold, William Bond John A. Collier, Edwin Hoyt, Edwin J. Nightingale, Samuel L. M. Barlow, George J. Forrest, John Elliot, and their associates, be and they hereby are created a body politic, by the name, style and title of “The Quicksilver Mining Company” and by such name and title shall have perpetual succession, and shall be capable of suing and being sued, impleaded, and being impleaded, and of granting and receiving, in its corporate name, property, real, personal and mixed, and of holding and improving lands in California or elsewhere, and to obtain therefrom any and all minerals and other valuable substances, whether by working or mining, leasing or disposing of privileges to work or mine such lands, or any part thereof, and to erect houses and such other buildings and works as may [243] properly appertain to said business, and to use, let, lease or work the same, and to dispose of the products of all such lands, mines and works as they may deem proper.

Section 2. The said company shall have power to make such By-Laws as they may deem proper to enable them to carry out the objects of the corpora-

tion, and the same to alter, amend, add to, or repeal at their pleasure, provided that such By-Laws shall not be contrary to the constitution of this State, or the provisions of this act, and to adopt a common seal, and the same to alter at pleasure, and to issue certificates of stock, representing the value of their property in such form and subject to such regulations as they may from time to time, by their by-laws, prescribe, and to regulate and prescribe in what manner and form their contracts and obligations shall be executed.

Section 3. The incorporators named in this act shall elect persons to serve as directors, a majority of whom shall constitute a quorum for the transaction of business, and shall hold their offices until their successors shall have been elected in accordance with the by-laws.

Section. 4. It shall be lawful for said company to establish the necessary offices for the business of the company wherein their business is located, and to have their principal office in the United States, in such place as they may deem expedient, at which place it shall be lawful to hold all meetings for the transaction of the business of the company.

State of New York,

Office of the Secretary of State.

I have compared the preceding with the original law on file in this office, and do hereby certify that the same [244] is a correct transcript therefrom, and of the whole of said original law.

GIVEN UNDER my hand and the seal of office of the Secretary of State, at the City of Albany, this

tenth day of April, in the year one thousand eight hundred and sixty-six.

[Seal]

ERASTUS CLARK,

Deputy Secretary of State."

"BY-LAWS

of

THE QUICKSILVER MINING COMPANY.

Incorporated by the State
of New York.

"I. An annual meeting of the stockholders shall be held in the City of New York, at such place therein, as may be designated in the notice for such meeting, on the third Wednesday in June, in each year, at one o'clock P. M. Notice shall be given of the time and place of holding such meeting by public advertisement, in two newspapers published in the City of New York, at least ten days prior thereto. The President shall present to said meeting, on behalf of the Board of Directors, a report of the affairs of the company for the year preceding.

II. The annual meeting of directors shall be held at the same place on the same day, between the hours of two and three P. M. * * * [245]

III. The common seal of this Company shall have upon its face * * * .

IV. Certificates of stock amounting to the sum of ten millions of dollars shall represent the value of the property of the corporation and the capital stock shall be divided into one hundred thousand shares of one hundred dollars each. Certificates of stock upon which Five Dollars per share shall be paid, shall be distinguished as preferred stock.

V. Said certificates shall be in such form as shall be prescribed by the Board of Directors.

VI. All certificates shall be registered on the books of the Company when issued. No certificate shall be transferable except * * * .

VII. The contracts and obligations of the Company shall be made and executed in such manner and form as the Directors may determine.

VIII. The corporate powers of the Company shall be exercised by a Board of Directors, and such officers and agents as they shall appoint. The Board of Directors shall consist of eleven persons, each of whom shall be a stockholder within one month after his election. They shall elect a president, vice-president, treasurer and secretary to hold office during the pleasure of the Board, and shall have the power to make rules and regulations not inconsistent with the By-laws of the Company and administer, alter or change the same; except that they shall have no power to do anything creating or causing any stockholder to be personally liable for the debts of the corporation.
[246]

IX. The said Directors shall hold their office until the next following election or until * * * .

X. The principal office of the Company shall be in the City of New York, and the Board of Directors may, in their discretion, * * * .

XI. The preferred stock shall be entitled to interest at the rate of seven per cent per annum * * * .

XII. The Directors shall hold stated, special or

adjourned meetings at such times and places as they may deem most convenient and consistent with the interests of the Company. At such meetings a majority of all the members of the Board shall form a quorum for the transaction of business. A smaller number than a quorum may adjourn a meeting.

XIII. The Directors shall have power to delegate, from time to time, such authority as they may deem necessary to the officers of the Company, or to any one or more members acting as a committee, in order that the business of the Company may, at all times, be transacted with promptness and dispatch.

XIV. The Directors may from time to time on the credit and responsibility of the Company borrow
* * * .

XV. The Directors shall, at the request of one quarter in interest of the stockholders, call a special meeting of the stockholders to act * * * .

XVI. These By-laws may be altered, amended or repealed, at any regular or special meeting of the stockholders, by a vote of a majority in interest of all the stockholders." [247]

Opinion.

*In the District Court of the United States for the
Northern District of California, Second Division.*

No. 15,752.

C. P. ANDERSON,

Plaintiff,

vs.

THE QUICKSILVER MINING COMPANY,
Defendant.

Memorandum Opinion.

BLED SOE, District Judge:

Insistent pressure of other matters awaiting my determination precludes anything but a brief résumé of my conclusions in this case, although I have gone over the evidence submitted and the helpful briefs of able counsel with the care and consideration which the importance of the controversy seems to require.

Under the admissions of defendant's counsel made in court during the progress of the hearing, the only question in the case is as to the liability of the defendant upon the claim for compensation advanced by plaintiff. No evidence was tendered upon the issue as to the value of the services rendered, and counsel for defendant very properly indicated that the only question to be tried was the one of the authority of defendant's president to employ plaintiff and defendant's obligation to compensate him for the services rendered in response to such employment. [248]

Very briefly, the controlling facts as they appeal to me are that, the defendant at the time of the transactions in controversy was, and for more than forty years has been, conducting the operations of its quicksilver mines in Santa Clara County, by means, presumably, of agents and general managers, sent out from, and reporting to, the head office, which was always maintained in the City of New York. During that period, and in fact during all of the time under which plaintiff alleges he was being employed by defendant's president, many thousands of dollars annually were being expended in the prosecution of the business of the corporation, including the mining of quicksilver, the carrying on of a general store, the selling of parcels of its immense property, and the doing of all things which seemed to be necessary or incidental to the consummation of the work in hand. The head offices of the company were in New York, more than three thousand miles away from this, the only property which the company owned. At that property, and apparently having general charge of all its activities, was the president of the corporation, Nones, who seemed to be the chief directive head and force of the corporation, and who was assisted and aided at all times, apparently, by Tatham, the treasurer and general manager of the company, and likewise a director along with the president Nones, who acted at all times under the direction of, but in sympathy with the president and apparently supreme directive head.

There is no doubt but that plaintiff was employed by Nones, the apparent supreme directive head of the

destinies of the corporation, to perform certain services for and in behalf of the corporation; neither is there any doubt but that such employment was had with the knowledge, acquiescence and active participation in all things attending it of Tatham, Nones' [249] treasurer, general manager and codirector. It may be, and probably is, true, although the proof is not entirely clear upon that point, that, the employment of the plaintiff for the purposes indicated by Nones, and for which compensation is sought in this proceeding, was without direct and precise authority emanating from the Board of Directors, and perhaps without knowledge upon their part as to such employment or its consequences. Be that as it may, however, plaintiff as a reasonable man, using reasonable diligence and discretion in the consideration of matters required by him to be determined, was in no wise apprised of this fact, if it be the fact. Under all the circumstances, considering the general course of the business of the corporation, considering the long distance from the head office to where the property was situated, considering the fact that two directors of the corporation were upon the ground, and that they were actively co-operating in the doing of all things which served to render the defendant liable to plaintiff as for compensation for services rendered, and considering the fact that these two men, Nones and Tatham, either together or singly, were apparently clothed by the corporation, more than three thousand miles away, with the control of the destinies and activities of the property belonging to the corporation, there is small wonder, to

my mind, that upon plaintiff being approached by Nones to secure certain options upon land having to do with water rights situate upon defendant's property, and to secure certain other rights of way between the mining property and the nearest large community whereon a railway might be constructed whereby the property of the defendant would be directly benefited and whereby the products of [250] its mining operations might be much more economically conveyed to market, plaintiff should have considered and been justified in considering that ample authority for his employment was lodged in the directive head then upon the ground. As was said by the Supreme Court of Nebraska in *Johnson vs. Milwaukee, etc., Investment Company*, 64 N. W. 1100: "In this case the corporation was located in Milwaukee in the State of Wisconsin. It was formed for the purpose of doing business in Wyoming and most of its business was there conducted. The very fact that the corporation and its general officers held their office at a remote point was an element for consideration. *Rathbun vs. Snow*, 123 N. Y. 343. One might be justified in dealing with a person in apparent management of the business in Wyoming, where the office of the corporation was in a distant state, where he would not be so justified if he found the general office and general officers at or near the place where the business was conducted." *A fortiori*, one might be justified in dealing with a person in apparent management of the business in California, assisted by another person a member of the Board of Directors and general manager of the corporation,

where the office of the corporation was and had been for over forty years conducted and maintained in the city of New York.

It is hornbook law, under the authorities; that an agency sufficient to meet all the requirements of this case might be created either expressly or ostensibly. Under the benign and just rules of the law, an actual agency is not less potent than an apparent one—one created by the negligence—want of ordinary care—of the principal. If the principal deliberately, or because of a want of due diligence upon its part, knowingly or negligently permits its special agent to assume [251] general powers or its general agent to assume powers in excess of the authority conferred, it will not be permitted in a court of justice successfully to maintain that it is not responsible for the acts done and performed by such agent in the furtherance of its business. A very fair statement of the rule, as I have gathered it from the books, is to be found in *St. Louis etc., Company vs. Wannamaker*, 90 S. W. 737, where it was said by the Supreme Court of Missouri that: “Apparent authority is such authority as a reasonably prudent man, using diligence and discretion, in view of the principal’s conduct, would actually suppose the agent to possess.”

It is inconceivable to me how the plaintiff, with the knowledge of the facts above detailed, viewing the apparent paramount authority of Nones, president, director and directive head of defendant’s property, and considering it in relation to and with the equally apparent co-operation, acquiescence and participa-

tion of Tatham, the general manager, and another director of the corporation, would not be justified in arriving at the conclusion that they were possessed of all the authority necessary to employ him for the purposes indicated. See *Dover v. Pittsburg Oil Company*, 143 Cal. 501; *Dickerson v. Colgrove*, 100 U. S. 580; *Southern Pacific Company v. City of Pomona*, 144 Cal. 339, p. 350; *Martin v. Webb*, 110 U. S. 7. The language of the Supreme Court of Colorado in *Witcher v. Gibson*, 61 Pac. 192, is not inopposite. There the Court said, in substance, that the principal is bound to keep himself advised as to the course of his business and to know whether his agent is using the specific authority which is granted to him, and if he is not, to advise the parties with whom he is dealing to no longer transact such business with him. [252]

The claim is made and has been given careful consideration that the doctrine of *ultra vires* as applied to corporate activities is applicable here, and that it, in itself, will suffice to deny plaintiff a recovery. Assuming that the doctrine is applicable at all, still I am in thorough sympathy with the proposition that it has no efficacy in this case, because of the fact that the contract solemnly and deliberately entered into by defendant through its authorized agent, has been fully performed by the plaintiff on his part. It would now be in the highest degree unjust to permit defendant to reap the benefit of whatever advantages may have accrued from the performance of the contract by the plaintiff and then deny to the plaintiff the compensation agreed to be paid, because of the

claim indulged in that the corporation had no power to enter into the contract at all. This conclusion, I think, is sustained by the language and holding of the Supreme Court of the United States. *Eastern B. & L. Association vs. Williams*, 189 U. S. 122.

I do not feel, however, that the doctrine of *ultra vires* is necessarily involved. Plaintiff was not employed to build or operate a railway or to build or operate a power or water plant. He was merely employed to secure options looking to the development of a water supply and water right already on the property of the defendant, and to secure rights of way by deed or otherwise for a railway, leading from defendant's property to the city of San Jose, and the operation of which, both as to carriage of freight and passengers, would presumably and probably directly aid and benefit defendant's property and defendant's business. New corporations were [253] in fact organized, which said corporations were to conduct these respective businesses; but plaintiff was employed, and he rendered his services not in the organization or the conduct or control of such new corporations and new businesses, but in the taking of certain preliminary steps looking to the transaction of these new businesses when the proper and adequate machinery had been provided. In so far as the inceptive features were concerned, however, the preliminary steps had to be taken, and in my judgment were properly taken by the defendant itself, because of the fact that its property and its business was thereby to be benefited. Under the circumstances, therefore, the taking of these neces-

sary preliminary steps was within the competency and the power of defendant corporation, and the plea of *ultra vires* is not sustained. *Brown v. Winnisimmet*, 11 Allen 326; *Fort Worth Civic Company v. Smith Bridge Company*, 151 U. S. 294.

It follows from these considerations that plaintiff is entitled to the relief as prayed for and the appropriate judgment will be entered to that effect.

Receipt of a copy of the within Bill of Exceptions admitted this 2d day of January, 1917.

B. A. HERRINGTON,
Attorney for Plaintiff.

[Endorsed]: Filed Feb. 20, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [254]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

No. 15,752.

C. P. ANDERSON,

Plaintiff,

vs.

THE QUICKSILVER MINING COMPANY, a
Corporation,

Defendant.

Petition for Writ of Error.

To the Honorable WM. C. VAN FLEET, Judge of
said District Court:

Now comes The Quicksilver Mining Company, a
corporation, by its attorney, A. H. Jarman, Esq., and
respectfully shows:

That on the 2d day of October, A. D. 1916, the Court found a verdict against your petitioner and in favor of said C. P. Anderson, and upon said verdict a final judgment was entered on the 14th day of October, A. D. 1916, against your petitioner, The Quicksilver Mining Company, a corporation.

Your petitioner, feeling itself aggrieved by the said verdict and judgment entered thereon, as aforesaid, herewith petitions the Court for an order allowing it to prosecute a Writ of Error to the Circuit Court of Appeals of the United States, for the Ninth Circuit, under the laws of the United States in such cases made and provided.

WHEREFORE your petitioner prays that a Writ of Error do issue and that an appeal in this behalf to the United States [255] Circuit Court of Appeals, aforesaid, sitting at San Francisco, in said Circuit, for the correction of the errors complained of and herewith assigned, be allowed, and that an order be made fixing the amount of the security to be given by defendant, The Quicksilver Mining Company, conditioned as the law directs, and upon giving such bond as may be required that all further proceedings may be suspended until the determination of the said Writ of Error by the said Circuit Court of Appeals.

A. H. JARMAN,

Attorney for Petitioner in Error.

[Endorsed]: Filed Dec. 5, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [256]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

No. 15,752.

C. P. ANDERSON,

Plaintiff,

vs.

THE QUICKSILVER MINING COMPANY, a
Corporation,

Defendant.

Assignment of Errors.

Now comes The Quicksilver Mining Company, a corporation, defendant above-named, and in connection with its petition for writ of error in this cause, makes and files the following assignment of errors in the above-entitled cause and upon which it relies to reverse the judgment entered herein as appears of record:

I.

The Court erred in rendering judgment for plaintiff for the reason that there is no evidence in the case, introduced either by plaintiff or defendant, from which the Court could lawfully find:

(a) That the defendant employed plaintiff to do any work or performed any services for or in its behalf in organizing, or otherwise, the San Jose and Almaden Railroad Company, or the Senonac Power Company, or for or in any other matter or thing.

(b) That defendant's alleged agent, superintendent and [257] president, or either or any of them,

were ever authorized by defendant, expressly or impliedly, to employ plaintiff for any purpose or service whatever connected with or related to any business in which defendant was engaged or had any right to engage.

(c) That defendant accepted said employment, or any employment, or the fruits or benefits of said alleged employment, or any employment or service by plaintiff of any kind or nature whatever with knowledge of all the facts connected therewith.

(d) That defendant, either expressly or impliedly, conferred authority on said Nones to undertake in its behalf the organization of the said railroad company and said power company, or to do anything in its behalf with either or both, or to perform any service of any kind or nature in relation thereto.

(e) That defendant ever held said Nones out as its general agent or representative with authority to bind it in any matter or thing outside of its usual and ordinary business of mining and producing quicksilver.

(f) That defendant ever sanctioned or ratified said alleged employment, or ever sanctioned or ratified said alleged railroad and power enterprises with knowledge of all the facts in connection therewith.

(g) That defendant ever accepted or retained or enjoyed any benefit of any nature or character from either said alleged railroad or power enterprises, or from any alleged services rendered by plaintiff for its benefit.

(h) That defendant ever accepted or enjoyed any benefit from said services, or from any expenditure of money made by plaintiff for its benefit.

(i) That defendant ever accepted or enjoyed or retained [258] any benefit or thing of value as a result of any service performed by plaintiff for its alleged benefit with knowledge on its part that said alleged services or benefit was performed by plaintiff with the expectation in him that he should be compensated therefor by defendant.

(j) That C. A. Nones was defendant's agent, general superintendent and president in the county of Santa Clara, State of California.

(k) That at the time of accepting said employment it was understood and agreed by and between plaintiff and defendant that plaintiff's compensation for said alleged service should be fixed and determined by and between plaintiff and defendant at a period of time when the work, so to be done by plaintiff under said employment, was substantially completed; and that when so completed that plaintiff and defendant should then arrive at a reasonable value of the services so rendered by plaintiff.

(l) That there was or is any amount due from defendant to plaintiff by reason of said alleged services, or for any other cause or reason at all, or that same should become due and payable from defendant to plaintiff at any time.

(m) That plaintiff ever entered upon and undertook said work and services, as required of him by defendant, and in this behalf that defendant did not

require or request plaintiff to *form* any work or services in connection with either the railroad or power enterprises.

(n) That said two corporations were organized for the exclusive benefit of defendant; that defendant was the owner of all the stock in each of said two corporations; that all the stock of said two corporations which stood in the name of persons other than defendant, was held in trust by such other persons [259] for the use and benefit of the defendant and was the property of defendant.

(o) That C. A. Nones was the president, agent and general superintendent of defendant; that said alleged employment of plaintiff was made through him and the said matters and things done and performed by plaintiff for defendant were so done and performed under the instructions and directions of the said C. A. Nones as such president, agent and general superintendent of this defendant.

(p) That the employment of plaintiff, as alleged in his complaint, was the employment by defendant; that the said alleged work and labor performed and services rendered were so performed and rendered by said plaintiff under defendant's employment of said plaintiff.

II.

That said judgment so entered was contrary to and is against law for the reason that there is no evidence:

(a) That said alleged employment of plaintiff by said Nones was within the limits of the authority

conferred upon said Nones as president of the defendant corporation.

(b) That defendant never at any time ever held said Nones out to plaintiff, or to the public, as having authority to employ plaintiff to undertake or to do any work or perform any service in connection with said railroad or power enterprise.

(c) That defendant ever authorized said Nones, either personally or impliedly, to employ plaintiff for any purpose whatever and particularly in connection with said alleged railroad [260] and power enterprises, and in this connection there is no evidence that defendant ever ratified or approved plaintiff's employment by the said Nones after being fully advised of all the facts in connection therewith.

III.

That the said judgment, so entered as aforesaid, was contrary to and is against law because the undisputed evidence in the case conclusively establishes:

(a) That said Nones had no right or authority, express or implied, to employ plaintiff in behalf of the defendant to perform any work or service in connection with said railroad enterprise or said power enterprise, or either of them.

(b) That said alleged railroad enterprise and said power enterprise were and are *ultra vires* and beyond the corporate powers of this defendant.

(c) That defendant never at any time ratified and approved either the said alleged employment of plaintiff by said Nones, or said railroad enterprise, or said power enterprise, after being advised of all

the facts in connection therewith.

(d) That defendant never accepted, received or retained any benefit of any kind or nature from plaintiff's alleged work and services, as alleged in his said complaint, with knowledge of all the facts in connection therewith.

(e) That defendant never ratified the acts of said Nones in employing plaintiff to perform the work and services alleged in his complaint, with full knowledge of all the circumstances. [261]

(f) That defendant never knowingly received and retained the benefit of the alleged contracts entered into by its president with plaintiff, as alleged in plaintiff's complaint.

(g) That defendant did not habitually suffer Nones to exercise powers in relation to any matter outside of the usual and ordinary business in which defendant was engaged, and in this connection the evidence establishes that neither defendant nor its Board of Directors had any knowledge that said Nones had engaged plaintiff to perform any services for defendant in connection with either of said alleged enterprises.

WHEREFORE, said The Quicksilver Mining Company, a corporation, plaintiff in error herein, prays that the judgment of said Court be reversed.

Dated, December 5th, 1916.

A. H. JARMAN,

Attorney for Plaintiff in Error, The Quicksilver Mining Company.

[Endorsed]: Filed Dec. 5, 1916. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [262]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

No. 15,752.

C. P. ANDERSON,

Plaintiff,

vs.

THE QUICKSILVER MINING COMPANY, a
Corporation,

Defendant.

**Order Allowing Writ of Error and Fixing Amount
of Bond.**

Upon motion of A. H. Jarman, Esq., attorney for
defendant, The Quicksilver Mining Company, a cor-
poration, and upon filing a petition for a Writ of Er-
ror and Assignments of Error;

IT IS ORDERED that a Writ of Error be and it
hereby is allowed to have reviewed in the United
States Circuit Court of Appeals for the Ninth Cir-
cuit the judgment heretofore entered herein and that
the amount of the bond on said Writ of Error be
and the same is hereby fixed at twelve thousand
(\$12,000) dollars.

Dated, December 5th, 1916.

WM. C. VAN FLEET,

Judge of the United States District Court, for the
Northern District of California.

[Endorsed]: Filed Dec. 5, 1916. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [263]

*In the District Court of the United States, for the
Northern District of California, Second Divi-
sion.*

No. 15,752.

C. P. ANDERSON,

Plaintiff,

vs.

THE QUICKSILVER MINING COMPANY, a
Corporation,

Defendant.

Bond on Writ of Error and Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, The Quicksilver Mining Corporation, a
Corporation, as principal, and National Surety
Company, a corporation, duly organized and exist-
ing under and by virtue of the laws of the State of
New York, and duly authorized to execute bonds
and undertakings in judicial proceedings pending
in the courts of the United States, as surety, are held
and firmly bound unto C. P. Anderson, plaintiff in
the above-entitled action, in the full and just sum
of twelve thousand dollars (\$12,000), lawful money
of the United States, to be paid to the said plaintiff,
C. P. Anderson, his administrators, executors or as-
signs, to which payment well and truly to be made,
we bind ourselves, our successors and assigns, jointly
and severally by these presents: [264].

SEALED with our seals and dated this 23d day of November, A. D. 1916.

WHEREAS, lately at a regular term of the District Court of the United States, for the Northern District of California, sitting at San Francisco, in said District, in a suit pending in said court, C. P. Anderson, as plaintiff, and The Quicksilver Mining Company, a corporation, as defendant, cause No. 15,752 on the law docket of said court, final judgment was rendered against the said defendant in the sum of seven thousand four hundred and eleven dollars (\$7,411), together with interest thereon at the rate of seven per cent (7%) per annum from March 5, 1912, and costs, and the said defendant, The Quicksilver Mining Company has obtained a Writ of Error and filed a copy thereof in the clerk's office of said court, to reverse the judgment of said court in the aforesaid suit, and a citation directed to the said C. P. Anderson, defendant in error, citing him to be and appear before the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city and county of San Francisco, in the State of California, according to law, within thirty (30) days from the date hereof;

NOW, the condition of this obligation is such that if the above-named The Quicksilver Mining Company shall prosecute its said Writ of Error to effect and answer all damages and costs if it fail to make its plea good, then this obligation to be void, else to remain in full force and virtue. [265].

Said surety further covenants and agrees that in

case of a breach of any condition of this bond that the above-entitled court may, upon notice to it of not less than ten (10) days, proceed summarily in the above-entitled action to ascertain the amount which the said surety is bound to pay on account of said breach, and thereupon the said court shall render judgment therefor against the said surety and may award execution therefor.

IN WITNESS WHEREOF said The Quicksilver Mining Company, a corporation, has caused its name to be hereunto subscribed by its president and secretary thereunto duly authorized and said National Surety Company, a corporation, has caused its name to be hereunto affixed by its officers thereunto duly authorized, this 23d day of November, 1916.

THE QUICKSILVER MINING COMPANY.

By JOSEPH KAUFMANN,
President.

By CHARLES E. TRACY,
[Corporate Seal] Secretary.

NATIONAL SURETY COMPANY,
By WM. A. T. ROMPSON,
Resident Vice-President.

Attest: By E. M. McCARTHY,
Resident Assistant Secretary. [266]

[Corporate Seal]

State of New York,
County of New York,—ss.

On this 23d day of November, 1916, before me personally appeared Joseph Kaufmann to me known and known to me, who, being by me duly sworn, did

depose and say, that he resides in the city and county of New York; that he is the President of the Quicksilver Mining Company, the corporation described in and which executed the foregoing instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument is such corporate seal, that it was so affixed by order of the Board of Directors, of said corporation, and that he signed his name thereto by like order.

[Notarial Seal]

H. E. EMMETT,

Notary Public for Kings County No. 9.

Certificate filed in New York County No. 20. Nassau, Bronx No. 1. Queens No. 631, Richmond and Westchester Counties; Kings County Register's Office No. 9043; New York County Register's Office No. 2623; Bronx County Register's Office No. 524.

My commission expires March 30, 1918.

Capital \$3,000,000.

AFFIDAVIT, ACKNOWLEDGE, AND JUSTIFICATION BY GUARANTEE OR SURETY COMPANY.

State of New York,

County of New York,—ss.

On this 23d day of November, one thousand nine hundred and sixteen before me personally came Wm. A. Thompson, known to me to be the resident vice-president of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of The Quicksilver Mining Company as a surety thereon, and who, being by me duly sworn, did depose and say that he

resides in the city of New York, State of New York; that he is the resident vice-president of said company, and knows the corporate seal thereof; that the said National Surety Company is duly and legally incorporated under the laws of the State of New York; that said company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the within Bond of The Quicksilver Mining Company is the corporate seal of said National Surety Company, and was thereto affixed by the order and authority of the Board of Directors of said company; that he signed his name thereto by like order and authority as resident vice-president of said company; that he is acquainted with E. M. McCarthy and knows him to be the resident assistant secretary of said company; that the signature of said E. M. McCarthy subscribed to said *Bons* is in the genuine handwriting of said E. M. McCarthy and was thereto subscribed by order and authority of the Board of Directors; and in the presence of said deponent; that the assets of said company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of six million (\$6,000,000), dollars.

That — is the agent to acknowledge service for said company in the Judicial District wherein this bond is given.

WM. A. T. ROMPSON,
(Deponent's Signature.)

Sworn to, acknowledged before me, and subscribed in my presence this 23d day of November, 1916.

[Notarial Seal]

H. E. EMMETT,

(Officer's Signature, Description and Seal.)

Notary Public for Kings County No. 9.

Certificate filed in New York County No. 20; Nassau, Bronx No. 1; Queens No. 631; Richmond and Westchester Counties; Kings County Register's Office No. 9043; New York County Register's Office No. 2623; Bronx County Register's Office No. 524.

My commission expires March 30, 1918.

No. 28508—Series B.

State of New York,
County of New York,—ss.

I, William F. Schneider, Clerk of the county of New York, and also clerk of the Supreme Court for the said county, the same being a court of record, DO HEREBY CERTIFY, That H. E. Emmett, whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such deposition or proof and acknowledgment, a notary public, acting in and for the said county, duly commissioned and sworn, and authorized by the laws of said State to take depositions and also acknowledgments and proofs of Deeds, or conveyances for land, tenements, or hereditaments in said State of New York. That there is on file in the clerk's office of the county of New York, a certified copy of his appointment and

qualification as notary public of the county of Kings with his autograph signature. And further, that I am well acquainted with the handwriting of such notary public, and verily believe that the signature to said deposition, or certificate of proof or acknowledgement is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said court and county this 24th day of November, 1916.

[Seal]

WM. F. SCHNEIDER,

Clerk. [267]

Approved this 5th day of December, 1916.

WM. C. VAN FLEET,

Judge.

[Endorsed] Filed Dec. 5, 1916. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [268]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 15,752.

C. P. ANDERSON,

Plaintiff,

vs.

THE QUICKSILVER MINING COMPANY, a
Corporation,

Defendant.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

I, Walter B. Maling, Clerk of the District Court

of the United States, in and for the Northern District of California, do hereby certify the foregoing two hundred sixty-eight (268) pages, numbered from 1 to 268 inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the clerk of said District Court, and that the same constitutes the return to the annexed writ of error.

I further certify that the cost of preparing and certifying the transcript of record on writ of error in this cause amounts to the sum of \$153.40; that said amount was paid by defendant; and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 26th day of February, A. D. 1917.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,
Deputy Clerk. [269]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

No. 15,752.

C. P. ANDERSON,

Plaintiff,

vs.

THE QUICKSILVER MINING COMPANY, a
Corporation,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States of America, to
the Honorable WM. C. VAN FLEET, Judge of
the District Court of the United States, for the
Northern District of California, GREETING:

Because, in the record and proceedings, as also in
the rendition of the judgment of a plea which is in
the said District Court before you, between C. P.
Anderson, plaintiff, and The Quicksilver Mining
Company, a corporation, defendant and plaintiff in
error, a manifest error hath happened to the great
damage of the said The Quicksilver Mining Com-
pany, a corporation, plaintiff in error, as by said
complaint appears, and we being willing that error,
if any hath been, should be duly corrected, and full
[270] and speedy justice done to the parties afore-
said in this behalf, do command you, if judgment be
therein given, that then under your seal, distinctly
and openly, you send the record and proceedings,

with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city and county of San Francisco, in the State of California, on the 31st day of December, A. D. 1916, in the Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS, the Honorable WM. C VAN FLEET, United States District Judge for the Northern District of California, this 5th day of December, in the year of our Lord one thousand nine hundred and sixteen.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, for the
Northern District of California, Second Division.

By J. A. Schaertzer,
Deputy Clerk. [271]

Received a copy of the within Writ of Error this
— day of November, A. D. 1916.

Attorney for Plaintiff and Defendant in Error.

[Endorsed]: No. 15,752. United States District Court, Northern District of California, Second Division. C. P. Anderson, Plaintiff, vs. The Quick-silver Mining Company, a Corporation, Defendant.

Writ of Error. Filed Dec. 8, 1916. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk.

Return to Writ of Error.

The answer of the Judges of the District Court of the United States, for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk. [272]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

No. 15,752.

C. P. ANDERSON,

Plaintiff,

vs.

THE QUICKSILVER MINING COMPANY, a
Corporation,

Defendant.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States to C. P. ANDERSON and to BERTRAM A. HERRINGTON, his Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a Writ of Error duly issued and now on file in the clerk's office of the United States District Court, for the Northern District of California, wherein C. P. Anderson is plaintiff, and The Quicksilver Mining Company, a corporation, is defendant, and to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the [273] said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. C. VAN FLEET, United States District Judge, for the Northern District of California, Second Division, this 6th day of December, A. D. 1916.

WM. C. VAN FLEET,

United States District Judge. [274]

[Endorsed]: No. 15,752. United States District Court, Northern District of California, Second Division. C. P. Anderson, Plaintiff, vs. The Quicksilver Mining Company (a Corporation), Defendant. Citation on Writ of Error. Filed Dec. 6,

1916. W. B. Maling, Clerk. By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: No. 2941. United States Circuit Court of Appeals for the Ninth Circuit. The Quicksilver Mining Company, a Corporation, Plaintiff in Error, vs. C. P. Anderson, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed February 26, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2941.

C. P. ANDERSON,
Plaintiff and Defendant in Error,
vs.

THE QUICKSILVER MINING COMPANY, a
Corporation,
Defendant and Plaintiff in Error.

**Stipulation Extending Time to File Record on or
Before February 26, 1917.**

WHEREAS, counsel for respective parties have agreed upon a settlement of the Bill of Exceptions herein; and

WHEREAS, Judge BLEDSOE, who tried the cause, has been in the State of New York on official business and has just returned; and

WHEREAS, he has settled and approved said Bill of Exceptions and has suggested an addition thereto; and

WHEREAS, said Bill of Exceptions has been finally completed in accordance with the suggestions of the Judge;

IT IS THEREFORE STIPULATED AND AGREED that the record herein shall be filed in this court on or before Monday, February 26, 1917, and time therefore is extended accordingly.

Dated: February 23, 1917.

A. H. JARMAN,

Attorney for Plaintiff and Defendant in Error.

B. A. HERRINGTON,

Attorney for Defendant and Plaintiff in Error.

[Endorsed]: Original. No. 2941. United States Circuit Court of Appeals, Ninth Circuit. C. P. Anderson, Plaintiff and Defendant in Error, vs. The Quicksilver Mining Company, a Corporation, Defendant and Plaintiff in Error. Stipulation Extending Time to File Record. Filed Feb. 26, 1917. F. D. Monckton, Clerk.

At a stated term, to wit, the October Term, A. D. 1916, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the twenty-sixth day of February, in the year our Lord one thousand, nine hundred and seventeen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge; Honorable CHARLES E. WOLVERTON, District Judge.

No. 2941.

THE QUICKSILVER MINING COMPANY, a
Corporation,

Plaintiff in Error,

vs.

C. P. ANDERSON,

Defendant in Error.

**Order Extending Time to File Record on or Before
February 26, 1917.**

Upon motion of Mr. A. H. Jarman, counsel for the plaintiff in error, and agreeably to the stipulation of counsel for the respective parties, this day filed, and good cause therefor appearing, ORDERED, that the transcript of record in the above-entitled cause shall be filed in this court on or before February 26, 1917, and the time therefor is extended accordingly.

No. 2941

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE QUICKSILVER MINING COMPANY

(a corporation),

Defendant and Plaintiff in Error,

VS.

C. P. ANDERSON,

Plaintiff and Defendant in Error.

OPENING BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

A. H. JARMAN,

Attorney for Plaintiff in Error.

Filed this.....day of May, 1917.

FRANK D. MONCKTON, *Clerk.*

By.....Deputy Clerk.

No. 2941.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE QUICKSILVER MINING COMPANY

(a corporation),

Defendant and Plaintiff in Error,

VS.

C. P. ANDERSON,

Plaintiff and Defendant in Error.

OPENING BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

The Case.

Defendant in error sued to recover for services alleged to have been rendered at the request of plaintiff in error in the organization of two corporations, to-wit: Senonac Power Company of California, hereinafter designated as "Power Co." and San Jose and Almaden Railroad Company, hereinafter designated as "Railroad Co.," for securing options for the purchase of property, rights of way, water rights and for the doing and performing of such other matters and things as were from

time to time required of him in connection with the purposes for which said corporations were organized. His services were performed both prior to and after the organization of said corporations.

He alleged that he was employed by Charles A. Nones, president of the board of directors of The Quicksilver Mining Co., hereinafter designated as the "Mining Co." He alleged that Nones was president, agent and general superintendent and that the act of Nones in employing him for the aforesaid purposes was and is the act of the Mining Co. and that therefore it is liable to him for said services.

(Tr. pp. 1-9.)

The Mining Co., by its answer, denied that it ever employed Mr. Anderson to perform the services set forth in his complaint, and further averred that it never authorized any employee, agent or officer to employ him for any purpose whatever and that no agent, employee or officer was ever authorized or ever had authority or power to make any contract of employment with him for his services in connection with said Railroad Co. or said Power Co., or either of them; and further averred that the organization of said corporations was unauthorized and that their purposes were and are without the power of the Mining Co. to legally execute or authorize; in other words,—*ultra vires*.

(Tr. pp. 22-35.)

Upon the issues thus framed the cause came on for trial before the court, a jury having been waived. Judgment was ordered for defendant in error for the full amount sued for, the judgment being based upon findings of fact and conclusions of law, duly given and made.

(Tr. pp. 37-43.)

The case comes to this court on writ of error to U. S. District Court for the Northern District of California, Hon. Benj. F. Bledsoe presiding. The record is preserved by bill of exceptions.

Specification of Errors.

Our objections to the findings and the judgment of the court below are based upon the fact that there is no evidence in the record that the Mining Co. employed Mr. Anderson to do any work or perform any services for or in its behalf in connection with the Railroad Co. or Power Co., nor is there any evidence that it *impliedly* conferred authority on Nones to undertake in its behalf the organization of said Railroad Co. and said Power Co., or to perform any service of any kind or nature in relation thereto.

A few of the many assignments of error will suffice to advise the court of our contention and enable it to intelligently follow the argument. For convenience we quote:

There is no evidence:

“(a) That defendant’s alleged agent, superintendent and president * * * was ever authorized by defendant, expressly or impliedly, to employ plaintiff (Anderson) for any purpose or service whatever connected with or related to any business in which defendant was engaged or had any right to engage.”

(Tr. pp. 275-276.)

“(b) That defendant ever held said Nones out as its general agent or representative with authority to bind it in any matter or thing outside of its usual and ordinary business of mining and producing quicksilver.”

(Tr. p. 276.)

“That said judgment so entered was contrary to and is against law for the reason that there is no evidence:

(a) That said alleged employment of plaintiff by said Nones was within the limits of the authority conferred upon the said Nones as president of the defendant corporation.

(b) That defendant never at any time ever held said Nones out to plaintiff, or to the public, as having authority to employ plaintiff to undertake or perform any service in connection with said railroad or power enterprises.”

(Tr. pp. 278-279.)

“That said judgment, so entered as aforesaid, was contrary to and is against law because the undisputed evidence in the case conclusively establishes:

(a) That said Nones had no right or authority, express or implied, to employ plaintiff

in behalf of the defendant to perform any work or service in connection with said railroad enterprise or said power enterprise, or either of them.

(b) That said alleged railroad enterprise and said power enterprise were and are *ultra vires* and beyond the corporate powers of this defendant.

(c) That defendant never at any time ratified and approved the said alleged employment of plaintiff by said Nones.

(g) That defendant did not habitually suffer Nones to exercise powers in relation to any matter outside of the usual and ordinary business in which defendant was engaged."

(Tr. pp. 279-280.)

The questions to be presented and involved in this appeal are simple, yet in order to present them fully, it will require a full presentation and consideration of *all* the evidence in the case bearing on the disputed question, to-wit: the *authority* of Nones, as president of the Mining Co., to bind it by contract for services rendered by Anderson for the benefit of the Railroad Co. and Power Co.; independent corporations organized and existing under and by virtue of the laws of the State of California.

The Mining Co. concedes that Nones employed Anderson to do certain work in connection with said companies and so far as this case is concerned, the extent and nature of the services rendered are not controverted and rest solely upon the testimony of Anderson himself.

At the outset, and before entering into an analysis of the evidence, we direct the court's attention that there is no dispute of fact as between the parties. All the evidence was put in by defendant in error. Whatever conflict there is might be said to be intrinsic. A conflict under such circumstances goes to the weight of the evidence and all other things being equal, must be construed against the party introducing it. This question will be fully considered hereafter.

Without waiving or minimizing the importance of what might be termed the incidental legal questions, the one real question for determination is, whether the Mining Co. impliedly authorized or conferred authority on Nones to undertake, in its behalf, the railroad and water enterprises in which matters the services were rendered. This involves the legal problem whether the Mining Co. had any power so to do and its liability, if any, for *ultra vires* acts of its officers.

It is conceded that there was no express authority conferred on Nones by the Mining Co. to employ Anderson for any purpose nor was the employment of Anderson ever authorized or ratified by the Mining Co. Mr. Anderson had no dealings with the Mining Co. All his dealings in relation to the matters in controversy were had with Nones.

The theory of the trial in the court below is clearly indicated by the rulings on objections made to evidence offered in the nature of declarations

made by Nones to Anderson relative to the question of *authority*, and by the opinion of the court in awarding judgment in favor of the defendant in error.

Though we realize it is somewhat of a repetition and perhaps unnecessary we quote the record in the matters just referred to, as it clearly sustains our contention.

“MR. JARMAN. I desire now to interpose an objection to the form of this question in that Nones’ declarations can not bind this defendant; in other words, there must be something else in the record other than Nones’ declaration in order to bind the defendant as to Nones’ acts.

The COURT. Yes, and that would seem to be well taken; *you can not prove an agency by the declarations of an agent, extra judicial declarations.*”

(Tr. p. 74.)

“The COURT. The keystone of your arch is,—there being an agency proven,—there is no doubt about there being an agency,—*the question is whether or not there was authority to do the things that are sought to be charged against the defendant.* If that has been proven then the act,—and I apprehend this would be a part of the *res gestae* in so far as that goes, a declaration as to part of the conduct of the defendant *acting within the scope of his authority* and of course, it would be admissible against the principal. *Whether or not that has been proven,* I am not prepared to pass upon, because I do not know all of the proof * * *”.

(Tr. pp. 75-76.)

“Mr. JARMAN. I will ask counsel if the question framed is limited to the matter indicated by your Honor, not for the purpose of proving agency or authority, but simply for the purpose of proving a part of the *res gestae*. I have no objection to that. *I do object to it being introduced in favor of the alleged agency or in proof of the authority to do an act.*

The COURT. *It would seem to me that your position is incontrovertible in that respect.*
* * * *The question is, did he have authority to bind the corporation in the matter of organizing these corporations.”*

(Tr. pp. 77-78.)

“The COURT. If counsel have no objection to its admissibility within the limitation suggested by the court, which is to the effect that it will be considered by the court *only* in the event *that other evidence proves the existence of the agency* as claimed by the plaintiff, it can be admitted.”

(Tr. p. 79.)

During the cross-examination of the witness Brassy, upon objection made by counsel for plaintiff in error, counsel for defendant in error, in addressing the court, said:

“the defendant corporation permitted the people of the community to believe that he (Nones) had full power and authority to contract for the services of Mr. Anderson; that these facts were known to the plaintiff; now, *the defendant corporation held out the fact to the public that Mr. Nones had this authority;*

The COURT. *Of course, that is the question that we have to try, whether they did hold him out; if they did, you are no doubt en-*

titled to a commission; if they did not, another question is presented. *The question is, can you prove they held him out; that has never been brought home to the corporation itself.*"

(Tr. p. 105.)

"The COURT. But you are now seeking by this offered evidence here, as I gather it, to show something done by Nones which was brought to the attention of the plaintiff and presumably upon which the plaintiff, himself, relied, *but you do not in your offer seek to bring it home to the corporation. * * ** If such agency was not established then you could not establish it by showing something that transpired between the president of this corporation and a third person, upon which event the plaintiff did rely *unless you bring it home to the corporation and establish in some way cognizant of that fact or, through its negligence in permitting the acts to be done, it was responsible therefor.*"

(Tr. pp. 106-107.)

"Council for defendant very properly indicated that the only question to be tried was the one of the authority of defendant's president to employ plaintiff, and defendant's obligation to compensate him for the services rendered in response to such employment."

(Opinion District Court, tr. p. 45.)

The Facts.

For convenience and clarity we deem it advisable to consider the Railroad and Power projects separately. We will first present the facts

relating to the railroad. This will be done in chronological order that the court may be advised of the part taken by the Mining Co., either expressly or impliedly, conferring authority on Nones to engage in this enterprise.

The Mining Co. is a corporation, organized by special Act of the Legislature of the State of New York; on April 10, 1866. The substance of the incorporation Act relevant to this inquiry is as follows:

“Sec. 1 * * * are created a body politic by the name, style and title of The Quicksilver Mining Company, and by such name and title shall * * * be capable of * * * granting and receiving in its corporate name, property, real, personal and mixed, and of holding and improving lands in California, or elsewhere, *and to obtain therefrom any and all minerals and other valuable substances, whether by working or mining, leasing or disposing of the privileges to work or mine such lands, or any part thereof, and to erect houses and such other buildings and works as may properly appertain to such business, and to use, let, lease or work the same, and to dispose of the products of all such lands, mines and works, as they may deem proper.*”

“Sec. 2. The said Company shall have power to make such By-Laws as they may deem proper to enable them to carry out the objects of the corporation * * * and to regulate and prescribe in what manner and form their contracts and obligations shall be executed.”

(Tr. pp. 261-2.)

Its By-Laws provide:

“Art. IV. Certificates of stock, amounting to ten millions of dollars, shall represent the value of the property of the corporation and the capital stock shall be divided into one hundred thousand shares of One Hundred Dollars each. Certificates of stock, upon which Five Dollars per share shall be paid, shall be distinguished as Preferred Stock.”

“Art. VIII. *The corporate powers of the Company shall be exercised by a Board of Directors and such officers and agents as they shall appoint.*”

“Art. XIII. The Directors shall have the power to delegate, from time to time, such authority as they may deem necessary, to the officers, or the Company, or to any one or more members acting as a Committee, in order that the business of the Company may, at all times, be transacted with promptness and dispatch.”

(Tr. pp. 263-4.)

From the time of its incorporation the Mining Co. has owned and operated and now owns and operates certain mining properties situated at New Almaden, Santa Clara County, California, being generally known and designated as New Almaden Quicksilver mines.

From June, 1909, to June, 1913, C. A. Nones, a resident of New York, was a member of its board of directors, and president of the company, and one M. A. Bowe, also of New York, was secretary.

From June, 1910, until June, 1913, J. F. Tatham was also a member of the board of directors, treasurer of the company and general manager, and as

such had charge of the company's properties in California; attended to its business and took charge of its product, to-wit: quicksilver, shipped same, collected and received, as treasurer, all moneys realized from sales thereof.

THE RAILROAD COMPANY.

Mr. Anderson testified that in *May, 1911*, Nones came to his office in San Jose and stated that better transportation was absolutely necessary for the mines, etc., and asked him how he thought the people living along the line between San Jose and Almaden would entertain a proposition, that is, in the way of giving rights of way. He, Anderson, told him that he thought the people would be very glad to do something. Nones said:

"To-morrow morning you go out and see as many as you can of the owners nearest the Mining Company's property and arrange for a meeting."

Anderson immediately interviewed the residents and arranged for a meeting at the Pioneer school for 8 o'clock the next evening. Nones addressed the meeting, stating that *he* contemplated building an electric line; that there would be no stock sold; that the Mining Co. would pay for the building of the road and take all the stock, etc.

(Tr. pp. 63-65.)

Nones said that he depended entirely on him to procure the rights of way and franchises and *that the Mining Co. would pay him for his services.*

(Tr. pp. 65-66.)

A committee of citizens was appointed to work with Anderson. The matter was canvassed and discussed with the people living along the line. Anderson worked continuously on the railroad project from *May* until the end of *July, 1911*, when he asked to have a preliminary survey made, as he wanted to know *whether the line would be feasible* from an engineering standpoint. He told Nones so and Mr. Hermann was employed to make a preliminary survey.

(Tr. pp. 66-7.)

Mr. Hermann worked on the railroad project, surveying, etc., from *August 7, 1911*, to *January 13, 1913*.

All franchises were applied for in Anderson's name and bid in by the Railroad Co. (It is not pretended that the Mining Co. was in any way directly connected with these matters or that it had any knowledge thereof.)

(Tr. p. 71.)

On *September 6, 1911*, Nones addressed a letter to Mr. Schumann, chairman of said committee. This letter, written at New Almaden, California, is in every sense of the word, *a personal letter* from Nones to the committee and does not purport on its

face, directly or indirectly, to have been made by or in behalf of the Mining Co.

Such expressions as "has submitted to me," "my proposition," "arrangements with me," "will deliver to me the cash collected upon subscription in a sum not less than \$4500," "convey to me or my assigns," "that I or my assigns," "after the receipt by me,"—are used.

(Tr. pp. 68-70.)

Nones stated in the letter that the commencement of building the railroad would not be later than *December 6, 1911*. We direct the court's attention that up to this time, to-wit, September 6, 1911, the question of the proposed railroad had never been presented to, or considered by, the board of directors of the Mining Co. After writing this letter on September 6, 1911, Nones evidently returned to New York, for we find, on consulting the minutes of the Mining Co., that on *September 20, 1911*, a meeting of the board of directors was held at the company's office in New York, at which he was present and read a paper regarding a proposed electric road to be built from San Jose to Almaden.

(Tr. pp. 240-248.)

This report is the first mention in the Mining Co.'s Minutes of the proposed electric road. We quote that which is pertinent, to-wit:

"There have been several meetings on this matter with the residents of the valley who

are unanimously in favor of this undertaking and have so far subscribed in cash about \$10,000. This being a donation for which they will receive neither stock nor bonds of the proposed road. I believe this donation will amount to \$15,000 before the road is built.

Besides there has been *granted to me personally* for about three-fourths of the distance a private right of way of twenty feet in width and also sufficient land for turnouts and stations. The balance of the right of way necessary will have to be acquired from the County and will cost a few hundred dollars.

I am of the opinion that *if* a Company were formed to operate and build this line, that the line could be built by a certain contractor, with whom I have talked in San Jose, upon the following terms: * * *

This proposition is worthy of the most serious consideration. I have devoted several months to it and have obtained the approval of the majority of the property owners whose lands are along the proposed line of the railway."

After the reading of this paper, and on motion of Director Whicher, duly seconded,

"It was resolved that before taking action on an electric road to be built from San Jose to the mine, that the President furnish a complete specification showing itemized costs, possible earnings, etc., to be submitted at a future meeting of the Board. Mr. O'Brien stated that he knew a competent engineer who could furnish such a report and he was requested to engage same."

(Tr. p. 142; 189.)

On *October 2, 1911*, the board of supervisors of Santa Clara County declared McAfee Road a public highway. According to Anderson this was done as the result of his work and was necessary in order to straighten out the proposed right of way.

The next event in point of time, other than the continued services of Mr. Anderson, as testified to by him, is the organization of the San Jose and Almaden Railroad Company, duly incorporated on *October 19, 1911*, a copy of the Articles of Incorporation being in evidence. A mere reading of same should be sufficient to convince any one *that the powers and purposes of this corporation are not included within the charter of the Mining Co.*

(Tr. pp. 222-3.)

At the time of the incorporation Nones was in California, as he signed and acknowledged the Articles of Incorporation as one of the incorporators in San Francisco. But one meeting of the board of directors of the Railroad Co. was held, to wit, on *October 20, 1911*. One hundred and twenty (120) shares of stock were issued, to-wit, one hundred and seventeen (117) shares to Nones, and one (1) share each to Anderson Tatham and Brassy, and *no transfer* was ever made on the books of the Railroad Co. to the Mining Co. The stock was not even issued to the parties named as trustees.

Mr. Anderson continued in his work and secured subscriptions from the property owners along the

right of way and actually collected and deposited in bank a little over \$4500, which was to be paid to the Railroad Co. upon the completion of the road. This money was collected and deposited in bank prior to March 5, 1912.

On October 17, 1911, Tatham, as treasurer of the Mining Co., paid to himself as treasurer of the Railroad Co., the sum of \$1200. He had no authority to do this other than the demand of Nones and admits that he was not authorized by the board to do so.

During the month of October the Railroad Co. loaned the sum of \$1050 to the Mining Co.

(Tr. pp. 121-2.)

Shortly after the incorporation of the Railroad Co., Nones wired \$2000 to Anderson, which he immediately paid to Tatham as treasurer of the Railroad Co. Tatham immediately credited the *tag account* "New York Office", of the Mining Co. with \$2000. He frankly admitted that he had no authority to do this other than directions given him by Nones. The exact time of writing this money is uncertain but it was in October and subsequent to the incorporation of the company.

On cross-examination of the witness, Tatham, it was proved by the books of the Mining Co., which were in court, that on December 28, 1911, there had been expended of the Mining Co.'s funds to that date, for said railroad, the sum of \$2073.24.

The books also proved payment of the company's funds for said railroad on account of payroll, as follows:

January, 1912	\$ 152.16
February, 1912	263.15
March, 1912	793.75
April, 1912	66.13

A total to May 1, 1912 of \$1275.19
(Tr. pp. 122-123.)

Not a dollar of this money had been authorized by the board of directors of the Mining Co.,—in fact, the use of its funds by Nones and Tatham was not only unauthorized,—but unknown to it.

The books also proved that in June, 1912, there was

likewise expended	\$150.00
In August	25.00
In September.....	160.00
In October	208.50
In December, 1912	280.20

A total of\$823.70

Not a dollar of which had been authorized nor even known to the Mining Co. until Klink-Bean & Company's report on April 22, 1913.

Other than the payment of the corporate funds of the Mining Co., as aforesaid, and the practical completion of Mr. Anderson's services, nothing of importance transpired until March 5, 1912, when

Nones delivered to Anderson in Mr. Burnett's office in San Jose, the following letter:

"New Almaden, Cal., March 5th, 1912.

C. P. Anderson, Esq.,
San Jose, Cal.

For services rendered and to be rendered on the line of the San Jose and Almaden R. R., I hereby agree to pay you the sum of \$4500, payable on completion of the road.

Yours truly,

Charles A. Nones."

(Tr. pp. 81-83.)

Mr. Anderson testified that Nones said at the time that he thought it (his services) was worth all the money that had been collected along the line in the way of cash subscriptions, which was the sum of \$4500,—hence the amount due Anderson was arbitrarily fixed at \$4500.

On May 1, 1912, Nones was in New York and attended a special meeting of the board of directors of the Mining Co., from which the following appears:

"Moved and approved that the President's action in ordering the sum of approximately \$3000 to be charged to March expenses, said sum representing the amount of money actually expended upon right of way, surveys and cutting down grade for the proposed San Jose and Almaden road, all of which stock will be owned by The Quicksilver Mining Company.

Further resolved that the President's action be approved in receiving the stock for account of The Quicksilver Mining Company from the San Jose and Almaden road for the full amount of these expenses."

Mr. Anderson testified that he never heard of the action taken by the board of directors at this meeting until the depositions in this case were filed with the clerk, and also that he did not know of the action taken by the board at the meeting held on September 20, 1911.

Thus, up to this time, May 1, 1912, no affirmative action had been taken by the board of directors of the Mining Co. relative to the said railroad, which in any way sanctioned or authorized Anderson's employment or which authorized or directed Nones to engage in this railroad enterprise.

The resolution of May 1, 1912, approving Nones' expenditure of \$3000, is of no importance in this case and does not concern or affect Mr. Anderson for the reason that it was not known to him and he did not rely upon it; furthermore he testified that his part of the work had been completed at that time.

“Q. What else, if anything, was done by you, Mr. Anderson, after the procuring of these rights of way and franchises and the organization of the corporation?

A. *We were waiting for Mr. Nones, or The Quicksilver Mining Company to furnish the money to go ahead and construct the road. I had nothing to do with letting any contracts or anything, because they were never let. All I had to do was to furnish the franchises and the rights of way. Several contractors were taken over the line and figures were obtained as to the cost of construction.*

Q. The only services you were to render were to procure the rights of way and the franchises?

A. The rights of way and the franchises.

Q. What did you finally accomplish in that regard, as between the City of San Jose and the terminal of the road?

A. The entire line was complete so far as the rights of way and franchises were concerned. They were ready for construction to begin at any moment.

Q. Did Mr. Nones return to San Jose subsequent to the completion of your work or at the time of the substantial completion of it?

A. Yes. During March of 1912 he was here and spent quite a long time here; a couple of months or perhaps longer."

(Tr. pp. 80-81.)

Mr. Anderson's name *does not appear* on the minutes of the Mining Co. *prior* to May 1, 1912.

Mr. Swayne, a director of the Mining Co. during the entire period, testified that he never heard of Anderson save and except in connection with the sale of the New Almaden store, which was taken up for the first time at the meeting of May 1, 1912. Mr. Swayne testified that he first heard of Anderson's claim when the present action was commenced.

"Q. You knew that the project of an electric railway line to connect the works with the City of San Jose was a project initiated for the benefit of the defendant company, didn't you?

A. I knew that the plan was discussed; it was never authorized.

Q. Was it ever objected to?

A. Yes, seriously.

Q. By whom?

A. By Mr. O'Brien, Mr. Stern and myself."

(Tr. pp. 142-3.)

“Q. Mr. Swayne, you were questioned with regard to a resolution appearing at page 341 of defendant’s Exhibit ‘1’ for identification, being the Minute Book of The Quicksilver Mining Company, referring to an electric road, where it is reported that Mr. O’Brien stated that he knew a competent engineer who could furnish such report. Was this engineer, referred to by Mr. O’Brien, retained by the company?”

A. Not that I ever heard of.

Q. Did Mr. O’Brien resign after that?

A. Shortly after that, yes.”

(Tr. p. 148.)

Anderson admitted that during the Nones’ administration, he did not write any letters to the Mining Co. in New York and that he did not receive any letters from the company,—thus its board of directors is and must be relieved of responsibility on account of any express authority conferred on Nones.

The next event of importance in this case is a regular meeting of the board of directors held on December 12, 1912. Stockholders, owning of record twenty-five per cent of the capital stock, demanded that a special meeting of stockholders be called for the purpose of acting upon the general business of the company.

The meeting was adjourned to December 18, 1912, at which time a special meeting of stockholders was authorized to be held on the second Wednesday in February, 1913.

The minutes of an alleged regular meeting of the board, held on February 11, 1913, are interesting and inasmuch as they are short, we quote same:

“*February 11th, 1913.*”

*Regular Meeting called February 11th in place
February 12th, at 3:30 P. M.*

Present: C. A. Nones, M. A. Bowe and J. F. Tatham.

Mr. Tatham having come on from California to present the annual report to the Board of Directors and to report on any matters concerning which the Board might desire information.

There being no quorum, the meeting adjourned.”

(Tr. p. 254.)

The special meeting of stockholders was held on *February 15, 1913*. A stenographic copy of the proceedings was introduced in evidence by Anderson.

(Tr. pp. 224-230.)

Nones' relations with his stockholders are revealed by parts of his cross-examination, which are quoted, to-wit:

“Q. During that time were you not interested in the reproduction of the colloquy and the colloquies that took place *between the disgruntled stockholders and yourself* on that occasion.

A. No, Mr. Blandy, I was something like David Harum's flea-bitten dog; the fleas kept him so busy scratching that he didn't have time to think of his other troubles; I was something like that dog.

Q. David Harum says fleas are good for a dog, doesn't he?

A. I am not a dog.

Q. Well, there can not be much doubt but that on the 15th day of February, 1913, there was a special meeting of stockholders held at 45 Broadway.

A. There is no doubt about that; that is undoubted.

Q. You called that meeting?

A. I did.

Q. You were in the chair?

A. I believe so, yes.

Q. *Until you were ousted?*

A. *Until I was ousted."*

(Tr. pp. 181-182.)

"Q. You have no recollection that a motion was put to remove you as President at that meeting?

A. I have a very vivid recollection of it.

Q. *There was considerable acrimony on that occasion?*

A. *Almost.*

Q. *You were in a very unpleasant condition?*

A. *Something like the dog.*

Q. *Yes sir, but you held your ground, notwithstanding?*

A. *About ninety days."*

(Tr. p. 182.)

"Q. Now, Mr. Nones, this was a very acrimonious meeting; you were in the chair as President and the meeting had been called by you and turned into a meeting evidently in the interests of the disaffected stockholders, and you mean to tell me that that has passed clean out of your mind?

A. Absolutely, Mr. Blandy.

Q. Do you remember this question being put to you by Mr. Harby:

‘Q. (Mr. HARBY) I would like to ask if the Company obtained a charter for the building of a railroad?’

The CHAIRMAN. No, sir.

Mr. HARBY: Was anything expended on account of obtaining a charter?

The CHAIRMAN: Yes, about \$3500.

Mr. HARBY: I would like to ask how that was expended?

The CHAIRMAN: That was expended under the direction of counsel, Mr. Burnett, of Wilcos and Burnett of San Jose.

Mr. HARBY: For what purpose?

The CHAIRMAN: For the purpose of obtaining rights of way for the New Almaden and San Jose Railroad, of which The Quicksilver Mining Company owns all the stock.

Mr. HARBY: This road you mentioned is an incorporated affair?

The CHAIRMAN: Yes, sir.

Mr. HARBY: And the stock has been transferred to The Quicksilver Mining Company?

The CHAIRMAN: Yes, sir.

Mr. HARBY: But a franchise for the road has not been obtained?

The CHAIRMAN: It has, but not in the name of The Quicksilver Mining Company; in the name of the New Almaden & San Jose Railroad Company.’

Q. Do you remember that little colloquy between yourself and Mr. Harby?

A. I do not remember it, Mr. Blandy, but to my best knowledge and belief I confirm what I said in answer to those questions.”

(Tr. p. 183.)

“Q. You had the ordinary intelligence to understand a question when it is put to you?

A. I understood it according to my own light.

Q. *You, as president, were under fire?*

A. *I am not the first president that has been under fire.*

Q. *But you knew you were under fire, didn't you?*

A. *Certainly I knew there was disagreeableness.*

Q. And they wanted information as to The Quicksilver Mining Company's affairs, that is what they wanted, isn't it?

A. I do not know what they wanted."

(Tr. p. 185.)

This evidence is important in this case only as showing the attitude of the stockholders of the Mining Co. toward Nones, and the attitude of Nones toward the company. A reading of same will convince the most skeptical, that the stockholders were ignorant of the things which Nones had done in California and reveals clearly that he attempted and was doing things without authority and beyond the powers conferred upon him by reason of his office as president.

A meeting of the board of directors of the Mining Co. was held on *February 18, 1913*, at which a resolution was adopted authorizing an investigation of the books of account of the company by certified public accountants and the employment of a competent mining engineer to examine and make a report upon the mines and other physical properties of the corporation at New Almaden.

No further meetings of the board of directors were ever held and at the annual stockholders' meeting in June, 1913, a new board of directors was elected to succeed Nones and his board.

The result of the sensational stockholders' meeting of February 15, 1913, and the action taken by the board of directors, employing public accountants to examine its books and a mining engineer to examine its properties, became known to the public, and on April 2, 1913, the San Francisco "Chronicle" published the facts on the front page of the paper with sensational headlines.

(Tr. p. 219.)

This article was read by plaintiff. He was then advised that the stockholders of the company were not in accord with Nones and that they did not approve and sanction the things that he had been doing.

After being informed of the situation by the newspaper and after the appearance of the mining engineer and the accountants at New Almaden, all of which was known to him, and after learning of Nones' financial distress and inability to pay, Anderson handed a statement to Tatham for the first time on *May 19, 1913*, demanding \$4500 for services rendered in the railroad project. This statement, alleged to have been delivered to Tatham, was never received by the Mining Co. and it never knew or heard of his claim for \$4500 *until October, 1913*, when it received a written demand from him for the payment of this sum.

There is a *conflict in the testimony* of Anderson and Nones *on the question of authority*,—Anderson testifying that Nones engaged his services on behalf of the Mining Co., and Nones testifying that *Anderson was employed by him personally and not for and in behalf of the Mining Co.* We have given Anderson's testimony in reference to this subject. Inasmuch as Nones was his witness, the inconsistencies or contradictions of his witnesses should be called to the attention of the court and for this purpose we quote from Nones' testimony as follows:

“Q. Did you ever ask him (Anderson) to carry on the business of any corporation anywhere?

A. No, sir.

Q. Did you ask Mr. Anderson to secure options for the purchase of property for a railroad for you?

A. Yes.

Q. Did you ask him to secure options for the purchase of rights of way for you for a road?

A. I did.

Q. Did you ask him to secure options for the purchase of property and options for the purchase of water rights and rights of way for you?

A. Yes, for me personally, not for the Company.

Q. Did Mr. Anderson accept this employment from you personally?

A. Yes.

Q. Did you have any agreement with Mr. Anderson with respect to his compensation?

A. I gave Mr. Anderson a letter stating that he would be entitled to the sum of \$4500

upon the completion of the railroad for the work he had performed and was about to perform and that was signed by me personally.

Q. *Did you not give that to him on behalf of the Company?*

A. *I did not sir, I was not authorized."*

(Tr. p. 152.)

"Q. Did you ever write any such thing to him?

A. The letter which I have written and which I have given you the gist of was signed by me personally and I would like to explain the cause of the letter and why it was written.

Q. Mr. Nones, you will please give the explanation you have in mind.

A. Mr. Anderson purchased for the railroad Company certain rights of way and it is my belief that upon every right of way that he purchased he received a commission paid by the railroad company for his services, but he was at some work and trouble in getting consents from property owners along the line. He received his expenses for these and in addition to these received a cash bonus, which was deposited in bank to be paid over to the railroad upon its completion of \$4500. This \$4500 was a like amount of \$4500 *that I agreed to give Mr. Anderson personally, feeling sure that the Board of Directors when I placed it before that Board, would sanction the payment to him of \$4500 but he had no obligation from the Company."*

(Tr. pp. 153-154.)

"Q. I understood you to say that \$4500 was paid to him.

A. No, it was not paid to him.

Q. It was to be paid?

A. Yes, he had my personal letter and it was my intention to bring the matter up before the Board of Directors and then explain matters to them and allowing them to pay Mr. Anderson the \$4500 out of the \$4500 on deposit to the credit of the railroad company in San Jose.

Q. *That is, you hoped to obtain the authority from The Quicksilver Mining Company to pay Mr. Anderson the amount for which you personally obligated yourself?*

A. *That is correct, yes, Mr. Harby.*

Q. Did you ever fix the amount and value of the services that Mr. Anderson rendered to you?

A. No, I fixed it at \$4500 arbitrarily, that being the amount of cash on deposit voted as a cash subsidy."

(Tr. p. 156.)

"Q. Did you say to him that he would be paid for services to be rendered to you at any special time, or upon any fixed event happening, when he was to receive the pay?

A. *Upon the completion of the railroad, when the subsidy came due.*

Q. *You explained to him then, did you not, that his pay depended upon the railroad being built?*

A. *Precisely."*

(Tr. p. 157.)

"Q. You gave Mr. Anderson a promissory note for \$4500, did you not?

A. I do not think so, I think it was an agreement.

Q. *Did you ever give him a note of The Quicksilver Mining Company?*

A. *Never.*

Q. *Was it ever your intention to give him any note of The Quicksilver Mining Company?*

A. *It was not."*

(Tr. p. 158.)

"Q. Mr. Nones, you were just asked a question on cross-examination which you said you could not answer without explaining the matter in full, referring, I presume, to the Anderson matter. Will you please make whatever explanation you have in mind?

A. *I had no authority to offer the \$4500 under discussion to Mr. Anderson, that being a Company matter and the \$4500 being deposited in a bank in San Jose by people living along the right of way of the proposed railroad, but I told Mr. Anderson that I personally would be responsible for the payment to him of the \$4500 and that if the Company did not turn him over the \$4500, I would.*

Q. Did you say anything to him at the time about what authority you had to deal with him?

A. *I told him I had no authority from the corporation to turn over the \$4500 and that is the reason why, for his own protection, I made a personal contract.*

Q. He did that work at your request?

A. *He did that work at my request."*

(Tr. p. 188.)

"Q. Now, I want to know whether in dealing with Mr. Anderson you dealt fairly with him and let him know that condition of affairs, or whether you concealed from him that you did not have the express authority by resolution of the Board to so employ him?

A. *Mr. Anderson knew that I had no authority to dispose of the \$4500 whatsoever."*

(Tr. p. 197.)

“Q. Whose debt were you guaranteeing the payment of?

A. I was foolish enough to guarantee a man, C. P. Anderson, to receive \$4500, that is what I was doing. I assumed a foolish obligation so as to see Mr. Anderson succeed in business.

Q. Did you, in all this help have any personal uses of your own?

A. No, I wanted to build up The Quicksilver Mining Company.”

(Tr. p. 203.)

“Q. Was anything stated in the letter, any event stated in the letter, which might prevent him receiving that \$4500?

A. No, because at the time the letter was written I had every idea that the road would be built.

Q. *Then the thing you had in mind was that The Quicksilver Mining Company might not authorize his employment, wasn't that it?*

A. *Precisely, and might not authorize the \$4500, I made that statement before.”*

(Tr. pp. 206-7.)

“Q. He never presented any bill to The Quicksilver Mining Company for the matters set forth in this complaint, in this action, while you were president?

A. *Never did.*

Q. Did Mr. Anderson send a bill to The Quicksilver Mining Company for \$7411?

A. *Never to my knowledge.”*

(Tr. pp. 207-8.)

“Q. *Well, his employment must have been your own debt?*

A. *I always considered it as my debt.”*

(Tr. p. 209.)

No comment is necessary,—the conflict is obvious. The legal consequences resulting from such a condition of the evidence will be considered in the argument.

THE POWER COMPANY.

Such of the evidence stated in connection with the railroad project as is manifestly applicable to this company will not be repeated, but is referred to and incorporated with the following facts relating strictly to the power project.

Mr. Anderson testified that in the month of April, 1910, he had a conversation with Nones and Mr. Burnett concerning *certain options* which they desired him to secure.

“Q. Did he indicate to you at that time the purpose of procuring these options?

A. *He said it was for the purpose of getting control of the water in the canyon there for power purposes.*”

(Tr. p. 54.)

Nones told him that he was very anxious to have him attend to the matter at once, and that he did not want any one to know about it until the deal had been consummated. *Anderson began immediately.* He looked over the territory, consulted with Nones and Burnett, interviewed property owners and secured options on several properties.

“Q. Did you notify Mr. Nones of these options?

A. I notified Mr. Nones that I had these options.”

(Tr. p. 56.)

“The COURT. *This report is addressed to Mr. Nones as an individual. Why didn't you address it to him as president of The Quick-silver Mining Company?*

A. *There was no particular reason. It never occurred to me.*”

(Tr. p. 100.)

In October, 1910, the plaintiff made a trip to Randsburg in order to secure an option on some property that was desired. He did so, and took same *in the name of C. P. Anderson & Co.*, and not in the name of Nones, or the Mining Co.

(Tr. p. 91.)

After securing the options nothing further was done by him. *He was waiting until such time that Nones felt was the proper time to take up this land.*

(Tr. p. 57.)

At a meeting of the board of directors of the Mining Co., held on September 20, 1911, Nones made a written report concerning water, in which he referred to the lease made with the County of Santa Clara, and in which he recommended that,—

“this Company should then transfer to the Water Company which is now in existence, *all of the water rights*, receiving in payment therefor all the stocks of the Water Company.”

(Tr. pp. 240-48.)

Not a word is said in this report concerning Anderson's services, nor of any options secured by him. No reference is made to the *necessity* for acquiring other lands. All the information which the Mining Co. had was that it owned valuable water rights in California which, in the opinion of its president, could be sold for a large sum, reserving sufficient water for its use in its business of mining.

Upon reading this report a resolution was duly passed authorizing the president to sell and transfer these securities at a price of not less than \$150,000 in cash, or its equivalent reserving, however, the right for all power to carry on the company's business, and for not less than 200,000 gallons of water per day.

On March 18, 1912, a special meeting of the board of directors was held, at which the resolution adopted on September 20, 1911, was rescinded, and the following resolution was adopted in its place.

“Resolved that the officers of the Company be authorized to transfer to *Senonac Power Company all the water rights owned by The Quicksilver Mining Company*, together with a lease of the pipes of the County of Santa Clara. Said lease being for a term of fifty years, and in exchange therefor to receive all stock and other securities of the Senonac Power Company, and the *President is therefore authorized to sell and transfer these securities at a price of not less than \$200,000, in cash*, or its equivalent, reserving, however, to The Quicksilver Mining Company the right for all

power to carry on its business now and in the future, and for not less than 200,000 gallons of water per day.”

(Tr. pp. 248-9.)

At the time of this meeting Nones was in California. *This is the first mention of Senonac Power Company*,—the word “Senonac” being the name of “C. A. Nones” reversed.

Senonac Power Company was incorporated under the laws of the State of California on March 19, 1912. Anderson testified as to the reasons for incorporating this company:

“I think Mr. Nones stated that he had found out that the water was valuable and that the capacity of the old water company was not sufficient; he also stated at the time,—it was before the Public Utilities Act went into effect,—that he wanted to incorporate before that Act took effect. That was the object of incorporating the Senonac Power Company at that time. To increase the capital stock and have it incorporated before the Public Utilities Act took effect.”

(Tr. p. 60.)

A copy of the Articles of Incorporation is in evidence, some of the purposes of this corporation being:

“To generate, manufacture, purchase and transmit electricity * * * for supplying * * * electric power * * * light or heat * * * to incorporated cities and counties * * * also for furnishing electricity for lighting, heating or power purposes.”

(Tr. pp. 220-221.)

In order to complete the statement of facts it is necessary to direct the court's attention to the evidence relating to the question of *authority*, and *particularly* that which Anderson *relied* upon and which he claims warranted him in believing that Nones was authorized to act for and bind the Mining Co. in these two enterprises.

On cross-examination he was questioned concerning this matter and testified as follows:

“Q. And wanted you to go to work right away?

A. Yes, sir.

Q. And you started to work right away?

A. Yes sir.

Q. Did you ask Mr. Nones at that time concerning his authority to authorize you to do this?

A. Why no.

Q. You didn't question it?

A. No, I didn't question it.

Q. You proceeded to do the things that he requested you to do?

A. Yes, sir.

Q. And you continued to do anything that he requested along this line until your services were completed?

A. Yes, sir.

Q. In other words, so far as you are concerned, you never questioned his authority?

A. I did not.”

(Tr. p. 87.)

“Q. So far as the work for the Power Company was concerned, did you ever have any authority or receive any authority from the board of directors of The Quicksilver Mining Company authorizing you to do any of this work?

A. *No, sir.*

Q. Did you ever make any inquiry from the board of directors, or from the secretary of the company, whether Mr. Nones had any authority to do this?

A. I did not.

Q. You simply proceeded to do as he directed you to do?

A. Yes, sir.

Q. *Is that true as to the services rendered by you as to the railroad company?*

A. *Sure.*

Q. You made no inquiry of the board of directors whether Mr. Nones had any authority?

A. I did not.

Q. You made no inquiry of the secretary whether any resolution had been passed authorizing Mr. Nones to instigate or commence the building of a railroad from San Jose to New Almaden?

A. No.

Q. So that, as I understand you, so far as you were concerned, the services which you performed and for which you now seek recovery, so far as the defendant is concerned, *all that you know about it is that Mr. Nones, who was the president of the corporation, requested you to do it and promised you would be paid?*

A. Yes, sir.

Q. Did you know, Mr. Anderson, of any other authority, or any authorization whereby you should act as the representative of The Quicksilver Mining Company for looking up options either for the Power Company or for the Railroad Company?

A. No.

Mr. HERRINGTON: I think there is no question about the proposition, Mr. Jarman, *it is conceded that his entire services were rendered on the instructions of Mr. Nones as president of The Quicksilver Mining Company and we*

knew nothing about any authorization which Mr. Nones had as such president."

(Tr. pp. 88-89.)

Early in 1910, and *prior* to rendering any services either in the Power or Railroad matters, Anderson prepared an estimate of what he thought some of the Mining Co.'s lands could be sold for and gave it to Nones. We quote his testimony in reference to this estimate:

"Q. You discussed it with him?

A. No, he said that he had seen the estimate *but that he would not know on that trip whether the land would be sold or not; he said I won't know anything about it until I come back to California another time.*

Q. What did he say?

A. *He said he didn't know whether the land would be sold until he had made another trip to New York."*

(Tr. p. 85.)

Thereafter Anderson was employed to sell certain lands belonging to the Mining Co. He did so and received commissions therefor. In October, 1910, he received \$1000; in November \$325.00, and other commissions from time to time thereafter.

(Tr. p. 86.)

Anderson testified that after making a sale he followed it up and saw that deeds were delivered to the purchasers and the money paid. He also testified that in the year 1910 *his attention was directed to a resolution passed by the board of directors of the Mining Company authorizing the*

sale of said lands and that this resolution was objected to by Mr. Burnett and that the board of directors had to pass another resolution, as the attorney representing one of the purchasers would not accept the deed.

“I was present when Nones and Mr. Burnett discussed the resolution that his board had passed for the sale of such land by which his board instructed him to sell but not to convey; people objected that the word ‘convey’ had not been mentioned in the resolution.”

(Tr. p. 86.)

Anderson knew that Nones had to confer with some one in New York before he could offer the lands for sale and any person of ordinary sense would know from the language used, that he had to confer with and obtain authority from the board of directors.

He knew, therefore, prior to entering into negotiations with Nones that his authority was *not* absolute and unlimited.

Turning to the minutes we find that on August 17, 1910, a resolution was passed by the board authorizing Nones to sell certain lands belonging to defendant, as follows:

“On motion of Mr. Benedict, seconded by Mr. Whicher, the following resolution was adopted:

The President is authorized to sell up to 1400 acres of land belonging to the Company, it being understood that whatever sale of the property is made, all the mineral and other

rights would be reserved to the Company. The lands under consideration do not comprise the best lands owned by the Company and the President is authorized to fix a minimum price of not less than \$65 per acre for these lands, which is approximately the value of same. It is possible that a better price may be realized."

(Tr. pp. 232-3.)

On September 7, 1910, and September 22, 1910, resolutions were adopted by the board relating to the sale of company lands.

(Tr. p. 233.)

On September 22, 1910, the board passed a resolution authorizing the president to make a contract for the rebuilding of No. 3 furnace; on November 16, 1910, sales of land were ratified and approved by resolution duly passed; on March 22, 1911, sales of land were ratified and approved and Nones was authorized and empowered to deal with the Eureka Company. On April 12, 1911, after Nones had read a paper regarding the "paint matter" the board, by resolution instructed Director Whicher to employ the services of an expert to investigate the matter; the president was authorized to negotiate for the purchase of an aerial tram, and the matter of repairs to the large house was discussed and the president instructed to submit approximate cost of repairs at the next meeting; on June 5, 1911, a committee was appointed to confer with the company's counsel regarding the paint situation; on September 20, 1911, Nones was authorized to expend the sum of \$8000 for the

erection of a paint mill and at the same meeting, the board resolved "*that before taking action on an electric road*" that complete specifications, etc., be submitted to the board.

(Tr. pp. 233-248.)

Miss Bowe, secretary of the Mining Co., testified:

"Controversies often came up. I can not remember just what was approved or disapproved; something that comes up is not always approved."

(Tr. p. 213.)

The foregoing is quite sufficient to indicate that in all important matters, outside of the usual and ordinary routine of company business, *action was authorized by the board. No resolution was ever passed confirming authority on Nones to transact all company business.* He was merely a member of the board of directors and president of the company.

There is no evidence upon which to base an implied authority, furthermore the minutes expressly negative any such idea. All important matters, outside of the routine of business, were covered by resolution of the board, that is, *all matters of which the board had any knowledge.*

We particularly direct the court's attention to Nones' testimony concerning Anderson's employment in the Power project, to wit:

"Q. Did you ask him to secure options for the purchase of property, and options for the purchase of water rights, and rights of way for you?"

A. *Yes, for me personally, not for the company.*

Q. *Did Mr. Anderson accept this employment from you personally? A. Yes."*

(Tr. p. 152.)

"Q. I also find an allusion made to some water rights.

A. Yes.

Q. Were they associated with the railroad?

A. No, sir.

Q. That was a new enterprise? A. Yes.

Q. *Was that your conception also?*

A. *Yes."*

(Tr. p. 168.)

"Q. Anyway, so far as you are concerned, you did not put your personal obligation forward in respect to the water rights with him?

A. *I never made any contract with Mr. Anderson concerning water rights; never had any understanding with him concerning water rights."*

(Tr. p. 172.)

Plaintiff had performed and had practically completed his alleged services in 1912, yet no bill for same was ever presented to defendant until October, 1913, after he was advised of Nones' financial misfortunes and the election of a new board of directors.

Comment on the evidence is not necessary. There is no ambiguity or uncertainty. He who reads can understand.

This is merely a case where the president of a corporation, without authority and for reasons of

his own, undertook enterprises which he contemplated would or might be useful to his company and anticipated that his action would be ratified and approved by the board of directors.

Anderson positively asserts that Nones employed him for the Mining Co., and Nones, equally positive, asserts that his employment was personal and not corporate,—that he had no authority to bind the Mining Co. and that Anderson so understood. Aside from this contradiction in the evidence we fail to understand how the court could accept Anderson's testimony over that of Nones in face of the documentary evidence in the case. Every paper and document, created when no controversy existed and when harmony reigned, corroborates Nones' testimony. How explain the written promise of Nones to pay Anderson \$4500 for services in the railroad matter?

From the evidence we submit three inevitable conclusions:

1. That Nones was not authorized, expressly or impliedly, to employ Anderson.
2. That the Mining Co. has not ratified or approved Nones' unauthorized acts.
3. That said railroad and power enterprises were and are *ultra vires*.

These conclusions preclude recovery by Anderson for his services rendered in the railroad and power projects.

For the court's convenience we submit our argument and authorities covering the foregoing conclusions in the order named, to wit:

- I. AUTHORIZATION, EXPRESS OR IMPLIED.
- II. RATIFICATION.
- III. ULTRA VIRES.

I.

AUTHORIZATION, EXPRESS OR IMPLIED.

The burden of proving his case rested with Anderson. It is not enough that he rendered services in good faith at the instances of the president of the Mining Co. This is not a case for services rendered in the usual and regular line of the company's established business. The judgment in favor of Anderson can only be sustained by proof that the Mining Co. had, expressly or impliedly, conferred authority on Nones to do the things upon which Anderson bases his right of recovery.

Unless a corporation expressly authorizes, or by act or deed holds out its agent as possessing the authority relied upon, one dealing with such agent does so at his peril.

Fontana v. Pacific Can Co., 129 Cal. p. 51.

Corporations are *not bound* by acts of agents *not* within limits of authority conferred on them

but are bound by acts of their officers and agents *within the scope of their apparent powers.*

10 Cyc., 935-938.

The mere fact that Nones was president of the board of directors conferred no power on him to bind the Mining Co.

“The office itself, however, confers no power to bind the corporation or control its property. *The President’s power as an agent must be sought in the organic law of the corporation, in a delegation of authority from it directly, or through its Board of Directors, formally expressed or implied from a habit or custom of doing business.*”

10 Cyc., 903, Note 67 and 68.

The president of a corporation “may acquire” larger powers than those ordinarily belonging to him *by being held out to the public as possessing them, and by being suffered by the directors habitually to exercise such powers in the face of the public.*

10 Cyc., 912.

The foregoing principles were recognized and applied by the Supreme Court of the State of California in the case of *Black v. Harrison Home Company*, 155 Cal. 121, in an opinion written by Mr. Justice Angellotti, in which he said, at page 126:

“*It is an elementary principle of corporation law that a president of a corporation has no power merely because he is president, to bind the corporation by contract. The man-*

agement of the affairs of a corporation is ordinarily in the hands of its board of directors, and the president has *only* such power as has been given him by the by-laws, and by the board of directors, and *such other power as may arise from his having assumed and exercised the power in the past with the apparent consent and acquiescence of the corporation.* The general rule in this regard is stated in 2 Cook on Corporations, § 716, as follows: 'The president of a corporation has no power to buy, sell, or contract for the corporation, nor to control its property, funds, or management. This is a rule which prevails everywhere, excepting possibly in the State of Illinois. * * * It is true that the board of directors may expressly authorize the president to contract; or his authority to contract may arise from his having assumed and exercised that power in the past; or the corporation may ratify his contract and accept the benefits of it, and thereby be bound. *But the general rule is that the president can not act or contract for the corporation any more than any other director.*'

There is no evidence in this case that the board of directors *habitually* suffered Nones to exercise powers in relation to any matter outside of the usual and ordinary business in which the Mining Co. was engaged. There is no evidence that the directors had any knowledge that Nones had engaged Anderson to perform services for the company in either enterprise.

If a corporate officer employs one to perform a service for the corporation and it is performed *with the knowledge of the directors, and the corpora-*

tion receives the benefit of such service without objection, the corporation is, of course, liable.

9 Cyc., 934-34, Note 36;

Hooker v. Eagle Bank, 30 N. Y. 83; 86 Am. Dec. 351;

Pacific Vinegar & Pickle Works v. Sidney M. Smith, 145 Cal. 352.

Before a corporation can be held liable for an "implied power" it must have consented to the appearance of power exercised by its agent, and this implies that the *corporation must have had knowledge of the acts of its agent.*

10 Cyc., 938;

Neuhart v. George K. Porter Co., 23 Cal. App. 526.

There is no evidence of habit or custom by the directors whereby Nones was held out to the public or to Anderson as possessing authority to bind the Mining Co. for services to be performed in a matter not only entirely out of and *different from its usual and ordinary business,—but in a matter entirely beyond the powers authorized by its charter.* There is no pretense of evidence indicating *knowledge by the Mining Co.* or its board of directors of Nones' alleged agreements with Anderson, nor of acquiescence by the Mining Co., or its board, after knowledge. The record discloses that the Mining Co. was not informed of Anderson's activities in behalf of either the railroad or power enterprise until long after his services were completed.

We take it that it requires no argument to convince this court that building a railroad and organizing and developing a power company is not the ordinary and usual business of a mining corporation. The doctrine of *implied powers or holding out* an agent as possessing the powers relied upon is not established by the evidence in this case for the reason that there is no evidence that the Mining Co. had any knowledge of the alleged authority exercised by Nones in relation to either enterprise, and there is no evidence that the corporation acquiesced in Nones' actions after being informed thereof, and finally, the power exercised was not in a matter that by any stretch of the imagination could be included within "usual and ordinary" business.

Prior to March 5, 1912, the board of directors did not father this railroad scheme directly or indirectly. Even then it was not advised of Anderson's employment nor of the services rendered by him, nor of its alleged liability by reason thereof. At this time his services were completed. In the report of Nones to the board of directors on September 20, 1911, he concluded as follows:

"This proposition is worthy of the most serious consideration. I have devoted several months to it and have obtained the approval of the majority of the property owners whose lands are along the proposed line of the railway."

(Tr. p. 248.)

The action taken by the board on the railroad matter speaks for itself:

"It was resolved that before taking action on an electric road to be built from San Jose to the mine, that the President furnish a complete specification showing itemized costs, possible earnings, etc., to be submitted at a future meeting of the Board. Mr. O'Brien stated that he knew a competent engineer who could furnish such a report and he was requested to engage same."

(Tr. pp. 142, 189.)

Nones testified that Anderson's services were performed *at his personal request*, and not at the request or for the Mining Co. If Anderson was an innocent victim he must bear the loss. It is evident that the Mining Co. has already suffered a heavy loss by the wilfull misuse and waste of its funds for an unauthorized purpose and from which it has received no benefit whatever.

Likewise as to the Power Co., there is no evidence of knowledge by the Mining Co. that Anderson was about to secure, was securing, or had secured options on lands for the purpose of controlling the waters of any canyon. There is no evidence that the Mining Co. ever knew or heard of Anderson's services until same were fully completed.

All the Mining Co. did was to authorize its officers to transfer to the Senonac Power Company all its water rights in California.

Obtaining options on land for the purpose of controlling the water rights of a particular canyon can not, by any stretch of the imagination, be held to be in the line of the usual and ordinary business of a Mining Co., especially in view of the fact that the record discloses that the company was desirous of disposing of the water rights it did own.

The whole power scheme is apparent to any person of ordinary intelligence. Nones and Anderson saw that in effecting a sale of the Mining Co.'s rights that in all probability adjoining properties would be necessary in order to round out the holdings. They, therefore, secured options in their own names on some of these properties as in their judgment might be required.

The price which the Mining Co. authorized its water rights to be sold for was \$200,000. The price which Nones was negotiating for was \$325,000. If a sale had been effected at this price for the Mining Co.'s water rights and also the options held by Anderson and Nones, does the court think for a moment that the Mining Co. would have received the entire selling price? Not a cent in excess of the \$200,000 would have been paid to the Mining Co.; \$125,000 would have represented the price of the options held by Anderson and Nones which the Mining Co. could not claim or controvert as it had not authorized or directed Nones to secure same in its behalf. The power deal was nothing but a scheme on the part of Anderson and Nones to make

a profit for their own account which they were unable to put through.

Anderson having failed to realize any profit on either the railroad or the power project, and being unable to collect the \$4500 from Nones, endeavors in this action to compel the Mining Co. to pay for services performed in matters which were entirely outside of and beyond the powers conferred upon the Mining Company by its charter.

In concluding this branch of our argument we say, in all sincerity, that there is not a scintilla of evidence that the Mining Co. ever authorized Nones to employ Anderson for any purpose whatever, and likewise, there is not a scintilla of evidence that the Mining Co. ever held Nones out to the public as possessing ostensible authority to engage in any enterprise outside of the usual and ordinary business in which it had been engaged for more than fifty years.

A collateral legal question arises in connection with the consideration of this subject which necessitates a reversal of the judgment.

The California Code requires that a plaintiff prove his case by a preponderance of the evidence and as the burden of proof rested upon Anderson we submit that he failed to make out a case which will sustain the judgment in his favor.

Two witnesses, Anderson and Nones, both for plaintiff in the court below, contradicted each other squarely. Neither was impeached and they stand

on an equal footing. One balances the other. Under such condition can it be said that Anderson has made out a case?

But to clinch our contention, all the documentary evidence corroborates Nones' testimony,—the letter to the committee,—Nones' report to the Mining Co.,—the minutes of the company,—the written promise of Nones to pay Anderson \$4500—and finally, Nones' testimony not denied by Anderson that he had received a letter from Anderson in which Anderson had recognized that it was a personal matter and not corporate.

Aside from this, the lower court had no right to reject Nones' testimony and accept the testimony of the party in interest. Anderson produced Nones as a witness in his favor. Doing so, he vouched for him to the court. Fortunately the appellate courts of California have dealt with this precise question. In *Zipperlen v. Southern Pacific Company*, Cal. App. Dec. 206, page 215, the court said:

“The authority by which a party in this state is allowed to contradict his own witness, or show that he has made at other times, statements ‘inconsistent with his present testimony’, is found in section 2049 of the Code of Civil Procedure. That section also provides that ‘the party producing a witness is not allowed to impeach his credit by evidence of bad character’. And, as seen, we think that the section was not intended as authority for the impeachment by any means of one's own witness, in the true legal sense of that term. The reference in that section to section 2052 of the same code merely means, we think, that before be-

ing permitted to prove that his witness has made previous inconsistent statements, the party must lay the foundation as provided by the last mentioned section—that is, must give the witness a chance to refresh his memory by calling his attention to the ‘circumstances of times, places and persons present,’ when and before whom such alleged inconsistent statement is claimed to have been made.

There are, however, certain qualifications to the rule established by section 2049, *supra*, and which it is indispensably necessary should be strictly observed, lest some other important rule of evidence be violated. First, the witness must give testimony damaging to the party producing him. Secondly, it must appear that the party by whom the witness has been produced has been misled and taken by surprise, and that he had reason to believe that the witness would give testimony favorable to his side. *A party producing a witness virtually stands as an indorser of the character of such witness, and by the act of calling him to testify in his behalf in effect declares to the court and jury that the testimony of said witness will strengthen and support his contention; so, when the witness gives evidence which tends to destroy rather than build up the cause of the party who has presented him to the court and jury as a person possessing information valuable and material to his side of the controversy, the law steps in and says that no litigant should thus be placed at the mercy of such treachery, and authorizes the party to explain why he called him as a witness and thereby acquit himself of the otherwise disadvantageous imputation of contributing toward making out a case against himself. But a party, under the guise of the rule in question, will not be suffered to present to the jury mere hearsay declarations—declarations admissible neither under the rule *res**

gestae nor as having been made in the presence and hearing of the party against whom they are offered. The statement, the admission of which under the indicated circumstances is here claimed to have been prejudicially erroneous, could not, it is obvious, have gone into the record either as part of the *res gestae* or as a declaration in the presence and hearing of the opposite party. If it was not admissible for the purpose of 'contradicting the witness', or of showing that he at another time made statements 'inconsistent with his present testimony', to the end that the party might explain why he introduce him as a witness, then it was incompetent for any purpose, because, if admitted, though a mere naked hearsay declaration, it would erroneously go before the jury as independent evidence.

We are aware that some early cases were disposed to hold that such testimony was admissible under no circumstances. We have not taken the trouble to ascertain whether, at the time of the filing of the opinions to which we refer, section 2049 of the Code of Civil Procedure, as it now reads, was a part of our law of evidence; but we would be unable to reconcile the intimation in those cases with the language of the section as it now exists. There is no reason upon principle why a party should not be allowed to contradict his own witness if the latter has betrayed such party and by his unexpected testimony placed the party producing and standing sponser for him in a false light before the court or jury. There is every reason in principle why such a practice should be upheld, where it is clear that it has not been abused. Moreover, the legislature has recognized the soundness of the principle.

The questions, then, determinative of the admissibility of the testimony here are: Did the witness give testimony adversely to the plain-

tiffs, for whom he was called to testify? If so, does it reasonably appear that the plaintiffs were taken by surprise because of the nature of the testimony given by said witness?"

In *Hopkins v. White*, 20 Cal. App. 234, at page 239, it is said:

"The evidence adduced to establish fraud and want of consideration is to be found in the testimony of the defendants who were the only witnesses to the facts relied upon as establishing the averments of the complaint. *In considering their testimony these witnesses are to be treated as having been voluntarily produced by plaintiff, vouching for their competency and credibility.* The rule would not estop plaintiff from calling other witnesses to dispute their statements but this was not attempted. Some minor statements of the witnesses, apparently inconsistent with their positive statements of material facts, may be discoverable in their testimony, but these latter can not for that reason be set aside and disbelieved. The conclusions deducible from positive statements of facts showing bona fides are not to be shaken by some comparison of inconsistent statements with each other, unless these inconsistencies tend directly to establish the issues of fraud and want of consideration and clearly dispute the evidence of good faith. An instructive discussion of the rule is found in *Clark v. Krause*, 2 Mackey (D. C.) 559-571. We quote 'The analogies, as well as the reason of the law, are against the ascription to the defendant of any special obligation in giving his personal testimony on demand of the complainant to create a case for his opponent by acquiescing in the imputation of bad faith while the charge remains unsupported by the testimony of a single adverse witness, or that unfavorable inferences are to be drawn from his failure to strengthen

circumstances of alleged suspicion, supposed to be inconsistent with his positive statements.' (Citing *Lingan v. Henderson*, 1 Bland. (Md.) 268; *Alexander's Practice*, 72; 2 *Daniell on Chancery*, p. 451). Fraud may be inferred from circumstances but it cannot be left wholly to conjecture. (*Kerker v. Levy* (140 App. Div. 428, 125 N. Y. Supp. 357).)''

See also:

Hammond v. McCullough, 159 Cal. 639;
Fanning v. Green, 156 Cal. 279;
Quick v. U. S., 140 U. S. 417.

Defendant in error having thus vouched for the credibility of Nones as a witness, the lower court was not justified in rejecting or disregarding his testimony. It was bound to accept it. The judgment rendered proves that Nones' testimony was either rejected or not considered. For this reason also the judgment is manifestly erroneous and should be set aside.

II.

RATIFICATION.

Inasmuch as this element, ratification, would be sufficient to sustain the judgment, if proven, we are taking the precaution of presenting the matter fully so as to satisfy this court that this element as a matter of proof and as a matter of law, is lacking in this case.

A ratification of an agent's authority can be made only in the same manner required for the con-

ferring of original authority, in other words, a corporation may ratify any act which it might have done in the first instance.

Salfield v. Sutter County Land Co., 94 Cal.
546;
10 Cyc., 1069.

While the authorities are not in harmony with respect to the question, the general rule is believed to be that a corporate act or contract can not be validated by ratification either

1. *Where the act or contract was wholly in excess of the powers of the corporation express or implied, or—*

2. *Where it was prohibited by positive law.*

10 Cyc., 1070, Note 43;

McCracken v. S. F., 16 Cal. 591;

Central Trans. Co. v. Pullman's Palace Car
Co., 139 U. S. 24.

It is well established that ratification must take place with full knowledge of the circumstances.

10 Cyc., 1079.

The Supreme Court of California, in the case of Blood v. La Serena Land and Water Company, 113 Cal. 221, carefully considered *the elements of a legal ratification* by a corporation of a contract originally defective and voidable for lack of power and authorization and *distinguishes* ratification from estoppel. The court, speaking through Mr. Justice Henshaw, used the following language:

"Ratification is thus a question of legal cognizance."

The Supreme Court of California, in the case of Gribble v. Columbus Brewing Co., 100 Cal. 67, states the law as follows:

“Corporations, equally with individuals, are subject to the rule that where, *with full knowledge of all the facts involved, a principal reaps the fruit of an unauthorized contract of his agent*, and for some time yields *acquiescence* to its provisions, he will be deemed to have ratified it, and will be estopped as against one who has fully performed the contract on his part from repudiating it to the injury of the latter.”

It is plain, therefore, that there is no liability in this case because of a ratification by the Mining Co., first, because it could not ratify an act which it did not have the power to enter into in the first instance, and, secondly, conceding power to ratify, there is no evidence of a ratification by it *with knowledge of all the facts* and circumstances of Anderson's employment.

III.

ULTRA VIRES.

No extended argument, in our judgment, on this phase of the case is needed. A mere comparison of the charters of the Mining Co. and the Railroad Co. and the Power Co. should be sufficient to conclusively sustain this contention. For the purpose of assisting the court in this comparison we submit the following authorities as decisive of the question:

“The contract of a corporation, which is unauthorized by, or in violation, of its charter, or other governing statute, is entirely outside of the scope of the purposes of its creation and is void, in the sense of being no contract at all, because of a total want of power to enter into it; that such contract will not be enforced by any species of action in a Court of Justice; that being void, *ab initio*, it can not be made good by ratification or by any succession of renewals and that no performance on either side can give validity to the unlawful contract or form the foundation of any right of action upon it.”

10 Cyc., p. 1146.

The reasons underlying the doctrine of *ultra vires* are clearly stated by Mr. Justice Gray in an opinion of Supreme Court of the United States, 131 U. S. 371, to wit:

“The reasons why a corporation is not liable upon a contract *ultra vires*, that is to say, beyond the powers conferred upon it by the legislature and varying from the objects of its creation, as declared in the law of its organization, are

1st. The interest of the public, that the corporation shall not transcend the powers granted.

2nd. *The interests of the stockholders that the capital shall not be subjected to the risk of enterprises not contemplated by the charter and therefore not authorized by the stockholders in subscribing for the stock.*

3rd. The obligation of every one entering into a contract with a corporation to take notice of the legal limits of its powers.”

This subject in California is controlled by Article 12, Section 9, of its Constitution, which provides as follows:

“No corporation shall engage in any business other than that expressly authorized in its charter or the law under which it may have been or may hereafter be organized.”

The Supreme Court of California in the case of *The People v. Stockton Savings & Loan Society*, 133 Cal. 611, has declared this provision to be a *mandatory and prohibitory and self-executing*.

It is elementary that persons dealing with corporations are bound to take notice of their powers.

It is likewise elementary that the authority of agents of corporations is necessarily *limited* to such contracts as the corporation *may lawfully make* and to such acts as the corporation *may lawfully do* and that *it can not be presumed* that the agents of corporations have authority to transact business which the corporation was not, by its charter, authorized to engage in.

10 Cyc., p. 946;

Alexander v. Cauldwell, 83 N. Y. 480.

In the case of *Knowles v. Sandercock*, 107 Cal. 629, the court had occasion to deal with a kindred question, to wit, the right of a corporation to deal in stocks or to become a stockholder in another corporation, and held:

“A private corporation has no implied authority to invest in shares of another corporation and in this State a corporation is forbid-

den to engage in any business other than is expressly authorized in its charter or the law under which it is organized, and a corporation organized for the purpose of manufacturing, importing, buying and selling furniture and upholstery, cannot hold stock in a hotel corporation, and its subscription to its stock is ultra vires and void, and it can not be charged with liability as a stockholder of the hotel corporation."

This decision expresses the true rule and the law governing this case. If it is unlawful for one corporation to deal in the shares of another corporation, it is likewise unlawful for a corporation,—in the absence of express authority so to do,—to organize another corporation.

The purposes of the proposed railroad, to wit, "*to engage in and conduct the business of a carrier of passengers, freight, mail and baggage and express for compensation,*" is so foreign to any purpose authorized by the charter of the Mining Co., that we submit this phase of the question without further argument.

We confess it difficult to understand how the Power Co. can possibly be included within the powers conferred upon the Mining Co., for it must be conceded that such powers possessed by it, to wit:

"to generate, manufacture, purchase and transmit electricity * * * for supplying * * * electric power * * * light, or heat, etc.,"

could not possibly be included within the power conferred upon the Mining Co. by its charter. *Such*

powers were not known or thought of when its charter was granted in 1866.

Being obviously an *ultra vires* enterprise, it was and is impossible for the Mining Co. to engage in any such enterprise, much less authorize its agent to do so in its behalf.

“An ultra vires or fraudulent act can not be ratified by the majority so as to bind the minority; neither can it be ratified by the Board of Directors.”

Cook on Corporations, p. 2412, § 733.

For this reason the judgment must be reversed and entered in favor of the Mining Co.

In closing this brief we direct the court's attention to the opinion rendered by the learned judge of the court below. We do not question the legal principles therein set forth, but we do question the court's conclusions as to the facts of this case applicable thereto.

The learned judge quoted with approval from *St. Louis Company v. Wannamaker*, as follows:

“Apparent authority is such authority as a reasonably prudent man, using diligence and discretion, in view of the principal's conduct, would actually suppose the agent to possess
* * *

Viewing the *apparent paramount authority of Nones* * * * and considering it in relation to and with the equally apparent co-operation, acquiescence and participation of Tatham, the general manager, * * * would not be justified in arriving at the conclusion that they were possessed of all the authority nec-

essary to employ him for the purposes indicated."

The logic of this leads to but one inevitable conclusion, to wit, that the Mining Co. is liable regardless of any part taken by it in reference to the matter,—whether it knew or whether it was negligent. If its agents held themselves out as possessing paramount authority as directive heads of the corporation, then the corporation is liable regardless of any act done by it. Such a conclusion is untenable and is not in harmony with the authority which the court cites, as it ignores entirely the language of the court, to wit: "*in view of the principal's conduct.*"

A careful reading of the opinion discloses no evidence of anything done by the Mining Co., expressly or impliedly, which might be termed "*the principal's conduct*" in reference to the subject matter. In fact the court says:

"It may be and probably is true * * * that the employment of the plaintiff for the purposes indicated by Nones * * * was without direct and precise authority emanating from the Board of Directors and perhaps without knowledge on their part as to such employment, or its consequences."

It is apparent from the authorities quoted that something must have been done by the Mining Co. which in law might be termed *such conduct as would authorize* "*the apparent paramount authority of Nones.*"

We have carefully examined the authorities cited in the opinion and we most respectfully submit that they do not sustain the conclusions for which they were cited.

The case of *Dover v. Pittsburg Oil Co.*, 143 Cal. 501, cited in the opinion, is not in point. In this case the owner of certificates of stock *ratified* an endorsement thereof in his name *by an ostensible agent* and informed the secretary of the corporation that the endorsement was *all right*.

The case of *Southern Pacific Company v. City of Pomona*, 144 Cal. 339, is also not in point for the reason that the railroad company was bound because the authority conferred on its agent was *unquestionably ostensible* and was *not questioned or denied* by the company, such agency having been *intentionally* engendered by the principal.

The case of *Dickerson v. Colgrove*, 100 U. S. 618, merely declares a principle of law that he who by his language or conduct leads another to do what he would otherwise not have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted.

If there was any language or conduct by the Mining Co. upon which Anderson relied, or which induced or warranted him in believing that Nones was possessed of full and complete authority, then the authority cited would be applicable. We do not quarrel with legal principles but we do insist that there is no evidence of anything done or said by

the Mining Company which clothed Nones with paramount authority, or which warranted Anderson in so believing.

In conclusion, we repeat there is not a scintilla of evidence that the Mining Co. ever authorized Nones to employ Anderson for any purpose whatever; there is no evidence that it ever held Nones out to the public as possessing ostensible authority to take options in its behalf and therefore as possessing authority to employ agents to assist him; there is no evidence that it knowingly received or accepted any benefits flowing from Anderson's services; there is no evidence that it ever ratified or approved his alleged employment after full knowledge of all the facts; and finally, there is no evidence of any benefits or any fruits of Anderson's services received or retained by the Mining Co. On the contrary, the evidence discloses that no benefits were received or enjoyed by it and that it suffered actual loss by the unauthorized use of its funds in these enterprises.

To sanction a recovery under circumstances disclosed by this record would so endanger corporate business as to compel iron clad rules limiting the liability of corporate officers, thereby hampering business freedom in ordinary and usual corporate business, otherwise, every corporation would be absolutely at the mercy of its president and any designing or unscrupulous president could bankrupt his company.

Inasmuch as Anderson was bound to know the extent of the powers conferred upon the Mining Co. by its charter, and the extent of the authority conferred by it upon its officers, he is not permitted to recover for such services unless the Mining Co. has, with knowledge, accepted and retained and enjoyed the benefits of his services.

There being no proof to this effect, we submit that the judgment must be reversed and judgment ordered in favor of the plaintiff in error.

Dated, San Francisco,

May 12, 1917.

Respectfully submitted,

A. H. JARMAN,

Attorney for Plaintiff in Error.

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No. 2941

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

THE QUICKSILVER MINING COMPANY
(a corporation),

Defendant and Plaintiff in Error,

vs.

C. P. ANDERSON,

Plaintiff and Defendant in Error.

Brief on Behalf of Defendant in Error.

B. A. HERRINGTON,

Attorney for Defendant in Error.

Filed this _____ day of May, 1917.

FRANK D. MONCKTON, Clerk.

By _____ Deputy Clerk.

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Clerk

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BRIEF ON BEHALF OF DEFENDANT
IN ERROR.

We shall endeavor to picture the characters and the property surrounding this litigation more fully than has been done in the opening brief.

The Quicksilver Mining Company was incorporated in the State of New York, by legislative enactment on April 10th, 1866. (261*).

(*Number in parenthesis indicates page of transcript unless otherwise indicated.)

The by-laws of the corporation provide for eleven directors. At all times the office of the company was in the City of New York. The stockholders met there annually upon the 3rd Wednesday in June. (263, 265). The directors were to meet at the New York office monthly. (212).

The property owned and operated by this corporation is commonly called the New Almaden Quicksilver Mine. This was not only a mining property, but consisted of vast acreage of agricultural lands approximating in all 8500 acres. (214, 104, 235-237). The Company had operated upon this property for the production of quicksilver extensively for many years.

The property is about twelve miles south westerly from the City of San Jose. A boulevard known as the Almaden Road connects the property with this City. (55, 56). The company's stores, buildings and reduction works are located at the terminus of this Almaden Road. About four miles westerly and in the vicinity of the McAbee Road, the Company was taking out ore upon their property at what was known as the "Senator Shaft." (66).

The property lies upon the eastern foothills of what is known as the Coast Range, and back of this is found the water shed of Los Alamedes, commonly called Almaden Creek. (55). This creek "had its source above this property and ran through the property about three miles in length" (119). "There was

a section of a dam 122 feet high that could maintain a flow of approximately 10,000,000 gallons a day. Some of the water from this creek was being utilized through a pipe line by the County for road sprinkling. The pipe line was approximately eleven miles in length.” (119).

C. P. Anderson, defendant in error, before engaging with plaintiff in error, was in the real estate business between four and five years, and was familiar with land values in that section. Had “lived there for many years,” and “knew every section of the country” and was “well acquainted with the people in that neighborhood.” (54).

CHARLES A. NONES, a resident of New York City, was elected President of the Company in June, 1909, and continued in office from term to term until June, 1913.

An office was maintained in New York City by Nones; the office force consisted of “an office boy” and a Miss Margaret A. Bowe, who was a stenographer or “operator on the typewriter”, and was also a director and secretary of the mining company. (210-240).

C. A. Nones made frequent trips to the Company’s property at New Almaden in Santa Clara County, and remained different periods of time.

J. F. Tatham was book-keeper for the Company at the mine, where he became acquainted with Charles A. Nones in February 1910. At that time Charles

A. Nones—then president of the Company—appointed Tatham “General manager”, and fixed his salary. He continued general manager until June 1913. His place of business was always in Santa Clara County. He “took orders with reference to the operation of the property from Nones.” He was elected *a director and treasurer* of the Company in June 1911 and remained such until June 1913. (113-114, 240.)

D. M. Burnett Esq. an attorney at law of San Jose, California, was the local attorney for the company during the regime of Nones. He was elected a director in June 1912 and served until June 1913. (251).

THE CAUSE.

When C. A. Nones became President, and visited the property, the great commercial value, to the mining company, of its water rights for power purposes and for irrigating the rich Santa Clara Valley orchard lands was recognized by him. In connection with the power proposition he concluded that an electric railroad from the mine to San Jose was not only advantageous but that it was a necessity to the Company. I use his language: “The railroad was a necessity” * * “I went out to California and I believed it was a necessity to the Company.” (191).

In the first instance, in April, 1910, Mr. Burnett, the attorney for the Company, sent for Mr. Anderson, introduced him to Mr. Nones, who was known by Mr. Anderson to be the President of the Company.

Mr. Nones and Mr. Burnett explained what was wanted with reference to "tying up the properties" that would be effected in securing complete control of water rights and power rights along Los Alamedos Creek. Options were to be obtained for the purpose of securing control of the water in the canyon above the Company's property.

Mr. Anderson accepted the offer made him. He was to be well paid when the work was done. He agreed to drop everything and start upon the work at once. There was something in the neighborhood of sixteen sections or 10,000 acres of land to be covered. (54).

Mr. Anderson entered upon this undertaking about April, 1910, and performed all the services required of him. He was to receive a reasonable value for his services. Nones informed him that he would see that Anderson was paid at least \$2500 for these services. (82).

(It is unnecessary to here discuss the services rendered or their value for the reason, that in open Court, during the trial; when defendant in error was prepared to prove all the services and their value, plaintiff in error admitted that the services were fully performed, and their value was as prayed for in the complaint, and that the amount of \$411.00 in money had been expended by defendant in error in these enterprises; and that if defendant in error was

entitled to recover he is entitled to recover the whole amount sued for.)

In the Spring of 1911 Mr. Nones engaged Mr. Anderson's services in the preliminary work for a proposed electric railroad from San Jose to New Almaden, also a branch line to the "Senator Shaft" heretofore mentioned. (63). Mr. Nones said that "he depended entirely upon Mr. Anderson to produce the rights of way" and franchises, and the Quicksilver Mining Company would pay for the services. (66). Mr. Anderson entered upon these services and "the entire line was completed so far as the rights of way and franchises were concerned." (81). This was in March, 1912, and at that time Nones agreed that the services were reasonably worth \$4500.

In addition to this work, Mr. Anderson paid out the sum of \$411.00 in connection with these services. To collect for the reasonable value of the services described and for the amount of the outlay, Mr. Anderson instituted this action.

The defendant in error abandoned all defenses save and except the claim that Nones was not authorized, expressly or impliedly, to employ Anderson; that the Company never ratified or approved Anderson's employment; and that the enterprises were *ultra vires*.

WITNESSES.

The trial Court heard the testimony of C. P. Anderson and J. F. Tatham; also the testimony of one A. L. Brassy, who was the owner of one share of stock and a director of the Power Company which was a subsidiary corporation of the mining company. Also witnesses Charles Herrmann, the civil engineer who surveyed the right of way for the proposed electric railroad; and Emory E. Smith, of the firm of Smith, Emory & Company, Chemical Engineers, Structural Engineers and Civil Engineers, who surveyed, mapped and platted a proposed dam and dam site with reference to the proposed power and water plant, and who analyzed the mining company's minerals—after the quicksilver had been extracted—for the purpose of determining the value of the same for paint purposes.

The other evidence offered at the trial of the cause consisted of depositions and the exhibits attached thereto. These depositions were taken on behalf of the mining company, plaintiff in error, in New York City, and were the depositions of C. A. Nones, Margaret A. Bowe and two others, stockholders, directors or officers of the mining company.

We desire to direct the Court's attention to the assertions emphatically made by counsel for plaintiff in error, that "Anderson produced Nones as a witness in his favor," and that therefore Anderson "vouched for him in Court." (Opening Brief of

Plaintiff in Error, pages 28, 53-57). An erroneous impression may be gained by the Court from this declaration. The deposition of C. A. Nones was taken in New York City by plaintiff in error, and not by C. P. Anderson (150), as was the case with all other depositions that were offered in evidence. The direct examination of C. A. Nones was conducted by Mr. Harby, acting as the Attorney for the Quicksilver Mining Company in New York City. At the commencement of the taking of his deposition we were represented by Mr. Marshall of New York City. Before the commencement of the cross-examination Mr. Marshall retired suggesting that his firm had been of counsel for The Quicksilver Mining Company in some matters and he therefore considered it improper for him to conduct the cross-examination of the witness. We have no hesitancy in saying now, since the remarks of counsel in the present brief, which were not made before the trial Court, that it is very evident from the original deposition that the withdrawal of Mr. Marshall would have been unnecessary had Mr. Nones testified with truth and frankness. We secured the services of Blandy, Mooney & Shipman, and it was through the very capable cross examination of a very able lawyer that Mr. Nones was finally compelled to divulge the truth; and fortunately, Mr. Blandy was greatly aided by the fact that before Mr. Nones gave his testimony he had declared in writing in the bankruptcy Court, that which was contrary to

what he had testified to in his direct examination. There is a marked conflict found in the testimony given by Nones himself. Nones was an unfriendly witness to defendant in error; and it may be clear upon reading the entire deposition of Nones that the excerpts quoted therefrom by counsel for plaintiff in error are directly contradicted in other portions of his testimony. It is true that upon the opening of the case at the time of the trial, all of the depositions taken in New York were presented in evidence by defendant in error, as were also all of the many and lengthy exhibits which accompanied the depositions.

This calls our attention to another subject discussed by Counsel for plaintiff in error which might mislead, unless attention is called to it. In the preparation of the transcript there was included at the suggestion of counsel for plaintiff in error, much discussion had between the Court and the attorneys at the time of the hearing. Counsel in his brief takes up the remarks of the Court for the purpose of indicating the Court's mind at the time of the trial. (7, 8, 9).

The original depositions consisting of 125 full typewritten pages, many extensive exhibits, including articles of incorporation, by-laws, printed annual reports and minutes of the mining corporation covering a period of several years were all offered in evidence, but none of them were then read. The testimony that was taken in Court was transcribed; the case was submitted on briefs. The remarks of the

Court, concerning the evidence at the time of the trial were made with full knowledge of but a small portion of the evidence. This fact was so stated by the Court, and will be found in the following language: "*Whether or not that has been proven I am not prepared to pass upon because I do not know all the proof.*" (75-76). "It (the evidence) will be considered by the Court only in the event that other evidence proves the existence of the agency as claimed by the plaintiff—it can be admitted." (79).

In view of this state of facts, we suggest that counsel's claim with regard to the testimony of Nones is untenable, and that it was for the trial Court to determine where the truth lay. It was for the trial court to determine the conflict of evidence; and upon the trial Court's determination of conflicting evidence the decision was in favor of defendant in error. In addition to this, we suggest that any construction made by the Court at the time of the trial based upon the evidence, only a small portion of which had then been heard, is not to be considered as against the construction of the testimony and evidence when completely examined, and construed as expressed by the opinion.

AUTHORIZATION, EXPRESS OR IMPLIED.

That the president of plaintiff in error had authority to employ defendant in error for the performance of the work which was done cannot be doubted.

Nones was the president of the Company and Tat-

ham was its treasurer and general manager. They, with D. M. Burnett, were the only representatives of the company in this State. No business involving the properties of the company could be transacted, so far as the public were concerned, with any other persons or person than Nones and Tatham. The parties in question had complete charge of the business of plaintiff in error. Some of the directors lived in New York and the meetings of the Board of Directors were held there, but, so far as defendant in error was concerned, the directors in question may just as well have lived at the North Pole and have held their meetings there. The defendant in error did not know them or any of them. He could not consult or inquire of them, and if persons performing work for the Company in California, or selling its goods in that State, could do such business with its president or its California Manager only at their peril, and were obliged to make inquiries of the board of directors, if they wished to be certain of binding the company, the plaintiff in error's business could not have been carried on. The president and the general manager of the plaintiff in error were not only its authorized and legal agents in the State of California, but were in law and in fact the Company itself.

The trial Court in the opinion uses the following language:

“There is no doubt but that plaintiff was employed by Nones, *the apparent supreme directive head of*

the destinies of the corporation, to perform certain services for and in behalf of the corporation; neither is there any doubt but that such employment was had with the knowledge, acquiescence and active participation in all things attending it of Tatham, Nones' treasurer, general manager and codirector." (46-47)

The question of authorization express or implied, requires an examination of the proof upon three subjects; Nones—the president—and his apparent general powers; the relation of the Company with the water problem; and the relation of the Company with the railroad problem.

NONES.

That C. A. Nones was the "apparent supreme directive head" of the mining company there can be no doubt. This is true not only as to the State of California, but also as to the New York Office.

It is but necessary for us to look to the officers of the company and from this we will know that the stockholders had made C. A. Nones in effect the entire Board of Directors. His stenographer, Miss Margaret A. Bowe, was a director and secretary. His appointee, J. F. Tatham, was general manager and treasurer; the California attorney engaged by him, D. M. Burnett, was a director, and each and all of them were subject to his dictation and obeyed his orders.

The Board of Directors met but seldom, and only when he met with them. He dictated the minutes

and controlled the funds in the treasury. Miss Bowe's testimony taken upon the behalf of plaintiff in error, and offered in evidence with all other depositions by defendant in error, is upon this question in part as follows:

"When I was secretary from June 1910 to June 1913 the head of the office was the president, Mr. Nones. (210). The minute book of the Quicksilver Mining Company commencing on page 302 is in my handwriting. (210-211).

"Mr. Nones prepared the minutes; *he would dictate to me what to write in the book, unless something special came up that I would take.*" (211).

"I believe I heard the matter of the construction of an electric road to connect San Jose with the mine discussed by Mr. Nones with the other directors of the Company. (212).

"Mr. Nones had been in California. *He was one time four months away so there would not be any minutes. * * **". The notices went out regularly whether there was a quorum or not. (212). Mr. Nones had charge of the office. There should be meetings of the Board of Directors every month. At the meetings Mr. Nones would report what had been done concerning the business affairs of the Company, and the things which had been accomplished would be discussed with the directors. The minutes would state whether Mr. Nones' transactions were approved. *I cannot remember any disapproval of any of his executive acts as president.*" (213).

Excerpts from the testimony of J. F. Tatham upon the question of Nones' complete dominion over the company show the following:

Upon Tatham's first meeting Nones in California, Nones made him general manager and fixed his salary. In June, 1911, Tatham was elected a director and treasurer though a resident of California. (113) He "never attended a directors' meeting of the Board of Directors of the Quicksilver Mining Company." (120).

"Q. Who had supervision and control of the property during that period? (While Nones was President)

"A. C. A. Nones, the president.

"Q. Did he take orders from any one?

"A. No. (114)

"Q. To cut a long story short you acted solely in all these matters upon the verbal order of Mr. Nones?

"A. Verbal and written. (122).

"Q. When Mr. Nones would come out here he would draw money?

"A. Yes sir.

"Q. That is in various amounts?

"A. Yes sir.

"Q. Did he give you a receipt or voucher for the money so drawn?

"A. No sir." (124)

The learned counsel for plaintiff in error criticizes the opinion of the Court touching the question of the

apparent unlimited power given Nones by the stockholders and Board of Directors over the long period of his administration as president of the Company.

In view of this we present an admission made by counsel directly contrary to this criticism and quote from page 124 of the transcript:

“Mr. Jarman.—What we desire to show, if your Honor please, is something that is familiar to counsel and to the witness and to myself; it is that Mr. Tatham as treasurer of the company paid out the corporation funds upon the say so of Mr. Nones absolutely; Mr. Nones would go into the safe and take out \$500, or \$1,000 or \$1500 or \$1,800 and it would be charged to the New York office; there would be no entries made in the Company’s books and it would be put on a tag or on an envelope; at the end of the year Mr. Tatham would enter a lump sum, for instance, one year it was \$9,176 and some cents. Some weight seems to be attached by counsel to the fact that Mr. Anderson was led into this matter somewhat by the fact that Mr. Tatham was a director of the defendant. Now, I have shown that Mr. Tatham never attended any meetings in New York. I desire now for the purpose of clearing up this matter of showing just the manner in which Mr. Nones handled the funds of The Quicksilver Mining Company; in other words, the treasurer of the Company not only paid its funds for the purpose of organizing other corporations for the purpose of exercising its corporate

powers, but that the Treasurer likewise used its corporate funds for any purpose that Nones directed him to use them.”

“The Court.—Doubtless Mr. Herrington will stipulate that those were the facts.”

“Mr. Herrington.—I will stipulate that what you state is correct: I think it is the truth.”

The Minute Book of The Quicksilver Mining Company was an exhibit accompanying the depositions from New York, and was before the Court at the time of the trial, and was in the custody of the Clerk of the District Court. At the time of the preparation of the transcript this exhibit, the minute book, could not be found, nor has it since been discovered, so far as I am personally advised. If it should be discovered, it is agreed by stipulation that the original book may be examined.

Excerpts from the minute book were in the possession of the plaintiff in error at the time of the preparation of the transcript, and they will be found on pages 231-256 of the transcript.

From this record we may be able to gather an idea of the indifference of the Board of Directors with regard to their regular meetings. During the incumbency of Nones several months at a time elapsed, and upon one occasion nearly six months elapsed, without a meeting of the Board of Directors.

Annual reports in printed form were made to the stockholders by Tatham as general manager and

treasurer, and by Nones as president. These annual reports are exhibits and by stipulation are subject to examination. These reports show the matters stated by counsel for plaintiff in error quoted above. The fact that the sum of \$9176 was charged in one year to the New York Office in a lump sum, and the fact that other similar lump sums were charged in other years to the New York Office because Nones would go to the safe and take out money at will, as stated by counsel, did not trouble the stockholders, or cause them to deprive him of his power and dominion over the money, property and affairs of the company during this long period of his incumbency.

They approved or acquiesced in his manner of handling the affairs of the Company and did not remove him until June, 1913.

THE POWER COMPANY.

The position of its property gave the mining company practically control over the Almaden Creek. This unquestionably was and is a very valuable asset to the Company. This fact was known to Nones, as president. The water and power was required for the mine and any surplus was salable. The power was further valuable for the operation of the contemplated electric railroad which was determined by the president to be a necessity. Other properties along the creek and above the mining company's property were required. Anderson undertook to procure these properties. The original power corpora-

tion was not satisfactory and a new one was formed, denominated Senonac Power Company. "Nones said that the stock of the Senonac Power Company was the property of The Quicksilver Mining Company." The stockholders were Nones, Tatham, D. M. Burnett, Anderson and Brassy. Each possessed one share issued upon the 21st day of March, 1912, and these shares were endorsed on the back in blank. Four thousand nine hundred and ninety-five (4995) shares were issued to The Quicksilver Mining Company March 22nd, 1912. (60-61). This makes a total number of 5000 shares, the number provided for in the articles of incorporation.

"A deed was executed by The Quicksilver Mining Company to the Senonac Power Company with reference to the company's water rights. The deed was in the possession of Mr. D. M. Burnett, the attorney for the mining company." (62).

The Quicksilver Mining Company was to pay Mr. Anderson for the money laid out by him in this matter. He was paid \$60.00 expense money while working on water options. (82).

Mr. Alfred H. Swayne gave his deposition on behalf of plaintiff in error. He is a New York lawyer. He was a director of The Quicksilver Mining Company from June 1909 until about January, 1915. To the following questions he returned the following answers:

"Q. You also heard discussed in directors' meet-

ings the development of the water rights and water powers *owned by the Company?* A. Yes.

“Q. And the object and purpose in the development of the company’s water rights and water power was to enable the company both to use its power to greater advantage and to sell power, wasn’t it?

“A. That was the plan.” (142).

At a meeting of the Board of Directors in New York City held on June 5th, 1911, the following proceedings were had:

“On motion of Mr. Swayne duly seconded by Mr. Whicher, the President was authorized to have Mr. Aaron, the Company’s counsel, prepare a Resolution re. California Power Company, to be submitted to the Directors at the next meeting.” (238).

At a meeting of the Board of Directors in New York City September 20th, 1911, the following occurred:

“The President then read a report on Water conditions “(see page 339)”, and on motion of Mr. Whicher, duly seconded, it was resolved that the officers of the company be authorized to transfer to the California Power Company all the water rights owned by the Quicksilver Mining Company, together with a lease of the pipes of the county of Santa Clara, said lease being for a term of fifty (50) years and in exchange therefor to receive all stock and other securities of the California Power Co.” (242).

Excerpts from the report of C. A. Nones presented to the Board of Directors in New York City upon this

day conclusively and absolutely show that this entire water and power enterprise was the enterprise of plaintiff in error.

“Owing to the contract which we have with the county, it entitled us to lease all pipes for a term of 50 years from date we elect to lease same, subject to a donation of 100,000 gallons of water per day to the county. I recommend that as soon as these pipes are properly installed that this company notify the county of its intention to lease said pipes and this company should then transfer to the water company which is now in existence all of the water rights receiving in payment therefor all the stock of the water company. * * *” 243).

“We have adverse possession to 3,000,000 gallons water per days, and although we could not supply this amount during the dry season without building another dam, we nevertheless can supply between 1,300,000 gallons and 1,700,000 gallons water per day.” (244).

At the same meeting of the Board of Directors in New York City the following proceedings were had:

“On motion of Mr. Whicher, duly seconded, and approved, the following motion was ratified that—

The President is therefore authorized to sell and transfer these securities at a price of not less than One Hundred and Fifty Thousand Dollars (\$150,000.00) in cash or its equivalent, reserving however, to The Quicksilver Mining Company the right for

all power to carry on its business now and in the future and for not less than 200,000 gallons of water per day." (245).

At the meeting of the Board of Directors on March 18th, 1912, the following proceedings were had.

"Resolved that the officers of the company be authorized to transfer to Senonac Power Company, all the water rights owned by the Quicksilver Mining Company, together with a lease of the pipes of the county of Santa Clara. Said lease being for a term of fifty (50) years, and in exchange therefor to receive all stock and other securities of the Senonac Power Company, and the President is therefore authorized to sell and transfer these securities at a price of not less than Two Hundred Thousand Dollars (\$200,000.00) in cash or its equivalent, reserving, however, to the Quicksilver Mining Company, the right for all power to carry on its business now and in the future, and for not less than 200,000 gallons of water per day." (249).

In harmony with the above resolution, a deed was executed by The Quicksilver Mining Company conveying the water rights mention to the Senonac Power Company. (63).

As a matter of fact, these valuable water rights which passed into the Senonac Power Company, all of the stock of which corporation was held and owned by plaintiff in error, was about to be sold for a large sum of money. "A deposit of \$1000 was up on

a sale of the water. The total purchase price was around \$325,000; the sale was being negotiated by Smith, Emory & Company. The sale was never consummated. The deposit was returned." (116). This prospective sale was reported to stockholders and directors about Dec. 31, 1911, by Nones. (259; also 146).

At all times plaintiff in error was the owner of these water rights. When plaintiff in error took over the stock of the Senonac Power Company it received the benefits of all of the services and expenditures of Mr. Anderson. Had this sale been consummated we apprehend that counsel for plaintiff in error would not have proclaimed that his client had not received the benefits of Mr. Anderson's labor.

Smith, Emory & Company made maps and plans and surveyed for a proposed dam for this power company. (132). For their services they were paid by The Quicksilver Mining Company.

A certificate of stock of the Senonac Power Company was issued to a Mr. Landers in January, 1914. Mr. Landers was at that time, and for many years afterwards, manager of The Quicksilver Mining Company at New Almaden. The stock was issued to him for the purpose of disincorporating. (62).

A deed was executed by the Senonac Power Company reconveying to The Quicksilver Mining Company all the rights that the power company had previously acquired from the mining company. (62).

In view of the foregoing facts of record, we assert that it requires some boldness on the part of counsel for plaintiff in error, when he criticizes the trial court for finding that this water project was the project of plaintiff in error; and that Mr. Anderson was "justified in considering that ample authority for his employment was lodged in the directive head there upon the ground."

One of learned counsel's clients in this action is not in harmony with his position. Alfred H. Swayne, a New York lawyer, and a director of the Company after the Nones administration, makes the following admission: "that Company (Senonac Power Company) *was merely a subsidiary of The Quicksilver Mining Company.*" (147).

THE RAILROAD COMPANY.

After Mr. Anderson had spent about a year upon the power proposition, Mr. Nones took up the proposed electric railroad with him; and stated at the first interview "that better transportation was absolutely necessary for the mines. That the company expected to put up a paying plant there and that the ore had to be more cheaply moved than it could be under the present system of hauling." (63).

Along the Almaden Road between San Jose and the mines is a thickly settled fruit producing country. It was suggested by Nones that a meeting of property owners be held at the school house in the

vicinity, for the purpose of getting their assistance in securing rights of way and franchises over and adjacent to the Almaden Road for the distance of twelve miles from San Jose to the Mine.

Mr. Nones attended the meeting, had Mr. Tatham, the manager of the mine there, and upon this occasion set forth his plans and said "that The Quicksilver Mining Company needed better transportation and he supposed that the rest of them did, and that he contemplated building an electric line, and he said there would be no stock sold, that The Quicksilver Mining Company would pay for the building of the road and would take all the stock." (64-65).

A committee of citizens of this vicinity was appointed. Mr. Nones asked that the Committee "try and produce a right of way free gratis from San Jose to New Almaden." It was found afterwards that this was impossible as a great many people preferred donating money rather than to give a right of way and have the cars running in front of their houses. (65). Mr. Nones depended entirely upon Mr. Anderson to produce the rights of way and the franchises and stated to him that The Quicksilver Mining Company would pay for his services, and wanted him to be very particular about getting everything correct. (65-66). Mr. Anderson immediately undertook this work and continued upon it and completed it in the early summer of 1912. At the beginning of August the preliminary survey was made. It took some three or four

months to locate the line. Mr. Anderson was working continuously. (67).

Mr. Anderson went out every day with Mr. Herrmann, the surveyor and Civil Engineer. Mr. Herrmann was working under Mr. Anderson's instructions. (67).

Upon Sept. 6th, 1911, Mr. Nones communicated with Mr. Schuman, Chairman of the Committee which was assisting in procuring the rights of way and in collecting a bonus for the proposed company. Counsel for plaintiff in error places much stress upon the fact that Mr. Nones merely signed his name personally and used the pronoun "I" throughout the letter. It was known throughout this entire community that Mr. Nones was the president of The Quicksilver Mining Company; it was known that the railroad project was the project of The Quicksilver Mining Company, and had been so announced to the Committee and at the first meeting of citizens when this committee was formed; that there would be no stock sold, and that The Quicksilver Mining Company would pay for the building of the road. Nones had no business in California other than the business of being president of The Quicksilver Mining Company.

Through the efforts of Mr. Anderson the McAbee private Road was declared to be a public road by the Board of Supervisors of Santa Clara County, and a franchise to run the proposed electric road over the McAbee Road was procured. This was simply a

branch line through a sparsely settled territory leading to what is known as the "Senator Shaft", and was *beneficial to no one except The Quicksilver Mining Company*. Mr. D. M. Burnett, the attorney for The Quicksilver Mining Company performed all of the legal services. (72).

The railroad company known as the San Jose & Almaden Railroad Company was incorporated. The original stockholders were C. P. Anderson, J. F. Tatham, manager of the mining company, D. M. Burnett, attorney for the mining company, and C. A. Nones, the president of the mining company. (At no time was A. L. Brassy a stockholder or officer of the Railroad corporation. Counsel for plaintiff in error has in his brief made an erroneous statement to the contrary.) The certificates of stock were issued on October 20th, 1911, one share to Anderson, Tatham and Burnett, each of which have endorsements in blank on the back thereof by the respective parties to whom they were issued. The certificate of C. A. Nones was for 117 shares. It bore no endorsement upon the back. It was produced in Court by counsel for plaintiff in error, who stated that he received it from Mr. Burnett who was the attorney for The Quicksilver Mining Company and also attorney for the railroad company. (73).

It may be noted at this time that the name of D. M. Burnett appears with that of A. H. Jarman as one of the attorneys for The Quicksilver Mining Company in the present litigation. (12, 17).

It was understood and stated by Mr. Nones that all of this stock of the San Jose & Almaden Railroad Company was being issued for the benefit of The Quicksilver Mining Company. (72, 79). Various sums of money were expended from time to time by The Quicksilver Mining Company in meeting the preliminary costs and expenses, in paying for surveys, rights of way, cutting down grades and the expenses of incorporating the railroad company.

\$650.00 were sent out from New York at one time and \$1350.00 at another time to Mr. Anderson. (70). Mr. D. M. Burnett was president and Mr. J. F. Tatham was treasurer of the railroad company. This money received by Mr. Anderson was turned over to Mr. Tatham and was paid out by him for rights of way. (79). \$1200 was furnished by The Quicksilver Mining Company and paid over to the treasurer of the railroad company. A portion of this money was used in securing the second franchise from the Board of Supervisors, for advertising etc. The balance was returned to The Quicksilver Mining Company and endorsed upon the books as a loan. (80).

In the month of March, 1912, Mr. Anderson's work was completed. All of the rights of way and franchises had been secured and the road had been completely surveyed. At this time, with Mr. Burnett, Mr. Nones and Mr. Tatham,—the president—the general manager and the attorney for The Quicksilver Mining Company; the only officers and

directors of The Quicksilver Mining Company upon the Pacific Coast; in the office of Mr. Burnett, Mr. Anderson was handed an instrument in Mr. Tatham's handwriting and signed by Mr. Nones, which is as follows:

“New Almaden, Cal., March 5th, 1912.

“C. P. Anderson, Esq.,
San Jose, Cal.

Dear Sir:

For services rendered and to be rendered on the line of San Jose & Almaden R. R., I hereby agree to pay you the sum of forty-five hundred (\$4500) dollars, payable on completion of the road.

Yours truly,

CHARLES A. NONES.”

(81-83).

At the time Mr. Anderson was handed this written instrument Mr. Nones made a statement to Mr. Anderson in Burnett's office that he had bought the rails, ties and fish plates and that the road would be completed in 90 days. (83).

From the testimony of Mr. Tatham, the general manager and treasurer of The Quicksilver Mining Company, we find the following:

“I was vice president and treasurer of the San Jose & New Almaden Railroad Company. The stock of this railroad company belonged to The Quicksilver Mining Company.

“About \$5,000 was expended for the promotion of the preliminary work of this railroad company. The money paid out belonged to The Quicksilver Mining Company. I paid it out. A portion of it came from the office at New Almaden and a portion came from the New York office. \$3,000 I think came from New York and \$2,000 from the office at the mine. A little work was done cutting down a bluff to the entrance of the Hacienda. It was done by The Quicksilver Mining Company and paid for by it. Surveys were made and paid for by the Mining Company. Abstracts were also secured, amounting to \$225. The survey cost in the neighborhood of \$500. These bills were paid for by the mining company.” (114-115).

“When the stock was issued Mr. Nones, the president of The Quicksilver Mining Company said that the stock that was issued to Nones was held in trust for The Quicksilver Mining Company.” (120).

A great number of different sums for different purposes paid by The Quicksilver Mining Company were entered upon the books of the mining company.

On The Quicksilver Mining Company's cash book were entries public to every stockholder and every director; entries which must have been accompanied and been a part of the annual reports which were printed and forwarded to the individual stockholders in New York City.

Among some of these different entries are the following:

On page 137 of the cash book of The Quicksilver Mining Company of date November 2, 1911, paid \$400.00 for the railroad company. (122).

November 27th, 1911, \$50.00 charged to the railroad company. (122).

December 28th, 1911, page 141, month's expenditures \$2073.24. This amount charged to the railroad company on the books of the mining company included the \$2000 of The Quicksilver Mining Company which had been sent out from New York to Mr. Anderson and had been turned over by him to Mr. Tatham. (122-3).

Jan. 10, 1912, page 145, to close pay roll \$152.16. Feb. 1912, \$263.15. March, 1912, \$793.75. April, 1912, \$66.13. June, 1912, \$150.00. August, 1912, \$25.00. Sept. 1912, \$160.00. Oct. 1912, \$208.50. Dec. 1912, \$280.20.

~~1912, \$280.20.~~ These payments were for wages for laborers in cutting down grades along the line of the railroad, which moneys were paid out by The Quicksilver Mining Company. (123).

Mr. Charles Herrmann, the surveyor and civil engineer, surveyed the right of way for the railroad. His services were paid for by The Quicksilver Mining Company. He was paid by check drawn by The Quicksilver Mining Company. The first payment was \$200 in September, 1911. On March 22nd, 1912, he received the mining company's check for \$292.50;

on October 7th, 1912, he received the mining company's check for \$72.00. (136).

These checks did not aggregate the full amount of Mr. Herrmann's bill; \$407.50 was still due him. This amount was paid him after Mr. Nones and Mr. Tatham and Mr. Burnett ceased to be directors or officers of the plaintiff in error. The final payment to Mr. Herrmann for surveying the proposed railroad line was made by the forwarding of The Quicksilver Mining Company's check from the New York Office to Mr. Herrmann January 14th, 1914. (134-5-6).

Mr. Anderson's complaint in this action wherein he seeks to recover for his services and for moneys paid out by him, was filed on the 21st day of February, 1914. (10). It will be noted that while it has been necessary for him to resort to suit, nevertheless, the new administration of The Quicksilver Mining Company paid Mr. Herrmann the balance for his services during the month preceding.

In the testimony of Mr. Alfred H. Swayne taken in New York by plaintiff in error, to the following questions he returned the following answers:

“Q. Referring to page 346 of the minute-book, Defendant's Ex. 1 for identification, is it not the fact that the Board of Directors approved the action of the president of the company in this expenditure of some \$3,000 upon a right of way, surveys and cutting down grades for the San Jose and Almaden

Railroad, the stock of which was to be owned by The Quicksilver Mining Company isn't that a fact? A. Yes.

Q. And at that meeting was there not a further resolution that the action of the president be approved in receiving the stock of the San Jose and Almaden road for the account of The Quicksilver Mining Company, the defendant in this action, for the full amount of expenses incurred? A. Yes." (143).

Long prior to this action taken by the Board of Directors, the president had submitted to the Board an extended report upon the railroad from which we quote in full as follows:

"The President then read a paper regarding an Electric Road to be built as follows (see page 342), and on motion of Mr. Whicher and seconded, it was resolved that before taking action on an electric road to be built from San Jose to the mine, that the President furnish a complete specification showing itemized costs, possible earnings, etc., to be submitted at a future meeting of the Board. Mr. O'Brien stated that he knew a competent engineer who could furnish such a report, and he was requested to engage same.

"Our maximum transportation tonnage has a daily capacity of not in excess of 20 tons, which we haul $7\frac{1}{2}$ miles at a cost of 60 $\frac{2}{10}$ cts, per ton. For this service we were paying last year \$1.25 per ton, and

this saving has been effected by ownership of our teams. All of which has been paid for.

“In the near future, we will have to consider the handling of not less than 60 tons daily and possibly 100 tons. We have reduced the cost of transportation as low as can be done so that an increased tonnage will force us to purchase additional teams, and will permit of no saving. Our calculations of hauling is based on 6 horses for every 8 tons.

“Only hauling 60 tons daily would cost us about \$37.00 or about \$12,000 per year. In addition to this amount, we are constantly paying for the hauling of our groceries from San Jose to the mine, and we haul about 25 tons monthly, at a cost of about \$4.00 per ton. Our entire hauling charges and feed bills amount to about \$15,000 per year.

“I submit the proposition to the Board regarding an Electric Road to be built from San Jose to the Furnaces. There have been several meetings on this matter with the residents of the Valley, who are unanimously in favor of this undertaking, and have so far subscribed in cash about \$10,000. This being a donation for which they will receive neither stock nor bonds of the proposed road. I believe that this donation will amount to \$15,000 before the road is built.

“Besides there has been granted to me personally, for about $\frac{3}{4}$ of the distance of a private right of way of 20 ft. width, and also sufficient land for turnouts

and stations. The balance of the right of way necessary will have to be acquired from the county and will cost a few hundred dollars.

“I am of the opinion that if a company were formed to operate and build this line that the line could be built by a certain contractor with whom I have talked in San Jose, upon the following terms:

“Original cost of road would not exceed \$110,000, to which would be added 10% for profit, and for this the contractor would receive 6% bonds of this Railroad Co., less amount of cash donated by residents. Said bonds to be guaranteed principal and interest by the Quicksilver Mining Co.

“The cost of hauling our own freight over this line this way would be very small. A 40-ton car as a trailer could be attached to any regular passenger car without further charge, and in addition to our saving for transportation, which will be in the neighborhood of over \$15,000 per year, we would also be able to carry passengers, haul freight and express packages for residents along the line.

“A close calculation of the population between San Jose and Almaden gauging the same for a distance of a mile east and west along the proposed line shows about 5000 people also three schools with a daily attendance of 150 scholars.

“Also beg to call your attention to the benefits accruing to us from this electric road. Our acreage along the proposed lines is composed mostly of hills

which are nothing but grazing lands and worth not over \$20 per acre. Should this line be built these hills would be desirable building sites, we retaining our mineral rights, as has been the case in similar localities, to wit, Los Gatos and Saratoga, two places which are situated from 6 to 7 miles of our property.

“We also own 128 acres of land along the proposed line which we could not sell for \$48 per acre for agricultural purposes last year. This land is finely situated for a townsite, and although we have sold 10 acres at \$110 per acre, we still have sufficient left to warrant setting out this land in $\frac{1}{2}$ acres plots which could be sold easily at \$150 per $\frac{1}{2}$ acre plot.

“This proposition is worthy of the most serious consideration. I have devoted several months to it, and have obtained the approval of the majority of the property owners whose lands are along the proposed line of railway.

(Personally signed)

CHAS. A. NONES,
President.” (245-248).

In addition to the foregoing report, the annual printed report of the president and treasurer covering a period from April 30th, 1911, to and including December 31st, 1911, which report was made to all the stockholders and directors, in so far as it concerned the railroad enterprise, is as follows, to wit:

“We were prevented from making a larger production for the eight months covered by this report

on account of the lack of transportation facilities. This I expect to overcome as this Company has within the last few months obtained the necessary rights of way and franchises for an electric line to be owned entirely by your Company and which will extend from San Jose to the town of New Almaden, where the furnaces are located. By this means we will be able to save considerable cost in our transportation and at the same time it will be possible for us to increase our hauling facilities, thereby also increasing our production. This proposed line will also transport passengers and express matter for the adjacent territory.

“Another benefit arising from the construction of this line will be the opening up of our lands, most of which can be developed and sold at a far higher price than would be obtained were this road not in operation.” (258-259).

As a further reason for the advantage and necessity of this proposed electric railroad, the following concerning the manufacture and transportation of paint was contained in the same report.

“I also wish to advise you that your directors have authorized the building of a paint mill with a capacity of 20 tons per day. This mill will be one of the by-product divisions of your Company, for the use of waste after the quicksilver has been thoroughly extracted therefrom and mixed with some ingredients under a certain process will make as good, if not a

better, metallic paint than can be found on the market at present. This company will be able to manufacture this paint at a very low cost and at the present market prices will be able to make large profits." (259).

Chemists had already analyzed the refuse or by-product from the quicksilver mine which had accumulated for years, and had reported the same to be very valuable for the manufacture of a metallic paint which could be produced in immense quantities and at a large profit. (240-241).

At the meeting of the Board of Directors on September 20th, 1911, concerning this paint proposition, the following proceedings were had:

"—and on motion of Mr. Swayne, seconded by Mr. Whicher, the president was authorized to expend not more than \$8000 for the erection of the paint mill, and to take such steps as might be necessary, under the advice of our counsel, for the formation of a company to conduct such business with the understanding that all of stock is the property of the Quicksilver Mining Company. Motion carried." (241).

It will be noted that another subsidiary corporation was contemplated with the understanding that all of the stock was to be the property of The Quicksilver Mining Company.

In the event of the construction of the electric railroad the increase in the value of the company's realty holdings was a matter of great consequence to the

Company; and the transportation of its goods and wares for its Almaden Stores was another subject for consideration in the matter of benefit and economy.

The testimony of C. A. Nones is dwelt upon considerably by counsel and we desire to discuss this briefly.

As heretofore stated, his deposition was taken in New York by plaintiff in error. We have no hesitancy in saying that an examination of his deposition shows a very pronounced effort on his part to avoid the truth, thereby favoring to The Quicksilver Mining Company. He swore that he never made any contract with Mr. Anderson concerning water rights. The facts of record and other evidence conclusively show to the contrary, as was found by the trial Court. He testified that he had procured Mr. Anderson to secure options for the right of way for the railroad for himself, personally, and not for the Company. The trial Court found to the contrary, and the finding is conclusively supported by the record; and before the cross-examination of Nones was completed, he was forced to contradict himself.

Nones had been forced into involuntary bankruptcy before this deposition was taken. At the time of giving his deposition he had forgotten what he had placed in his schedule concerning the Anderson liability. When he was confronted with this record he was compelled to admit that the services were per-

formed for The Quicksilver Mining Company. His schedule in bankruptcy on this obligation is as follows:

“Names of Creditors: *C. P. Anderson.*

Residences: *San Jose, California.*

When and Where Contracted: *San Jose, California, January, 1911.*

Nature and Consideration of Debt and Whether Any Judgment, Bond, Bill of Exchange, Promissory Note, etc., and Whether Contract as Partner or Joint Contractor With Any Other Person; and if so, With Whom: *Guarantee of Payment for Work Done for Quicksilver Mining Company.*

Amount: *\$4,500.”* .. (231).

When confronted with this schedule on cross-examination by our representative, Mr. Blandy, the witness Nones to the following questions returned the following answers:

“Q. Whose debt were you guaranteeing him?

“A. The Quicksilver Company, who were the owners of the majority stock, all the stock of the railroad company. (202).

“Q. Now, Mr. Nones, in your schedule in bankruptcy, to which you have referred, you will find that under oath you stated that you were indebted to Mr. Anderson for \$4,500 on a guaranty for work done by him for The Quicksilver Mining Company; is that a true statement?

“A. That is correct, yes, decidedly, decidedly.” (203).

Again, the very last question and answer of his entire deposition are as follows:

“Q. And you guaranteed him that \$4,500 for his services for The Quicksilver Company?

“A. I did.” (210).

The unlimited powers which Nones was permitted by the directors and stockholders to exercise, were in themselves ample to warrant any reasonably prudent man in concluding that he had authority to obligate the corporation for all services rendered by Mr. Anderson.

The conduct of all the officers of the corporation who were in California, the conduct of the Board of Directors and the stockholders as to each of the proposed enterprises, would and did warrant the same conclusion.

When all of these facts are combined—viz—the apparent unlimited authority and power of Nones over the business and property of the corporation—all the facts touching the relationship of the corporation with the water rights and the power proposition—and also with the railroad proposition—authorization, either express or implied, due to intention, acquiescence, holding out, or negligence, must be the conclusion—in fact—in law—and in justice.

RATIFICATION.

The facts establishing authorization are so interlaced with the facts establishing ratification, that it seems advisable to continue with and conclude with reference to the evidence upon both these subjects. While the facts already stated as appear from the record conclusively show authorization and ratification, there was in addition to these, an intentional and deliberate ratification in two distinct instances on the part of the stockholders.

At the annual meeting of the stockholders in New York on June 21st, 1911, the minutes of the meeting show the following:

“ * * * on motion of Mr. Hollinger, seconded by Mr. Velsor, all acts of the officers and directors of the Quicksilver Mining Company during the past year, were ratified and confirmed.” (239)

At the succeeding annual meeting of the stockholders in New York on June 19, 1912, the record shows:

“On motion all acts of the officers and directors of the Quicksilver Co. during the past year were ratified and confirmed.” (251).

It may be claimed by counsel for plaintiff in error that the majority of the stockholders were not present at the first meeting. This may or may not be true. The record shows that 41,619 votes were cast when the votes for directors were counted. Any stockholders absent at this time were absent of their own voli-

tion, as this was the regular annual stockholders' meeting.

At the next annual meeting 60,309 votes were cast, being over sixty per cent of all of the capital stock.

Plaintiff in error is estopped from denying this deliberate intentional ratification, and the ratification is binding; and a contention that a ratification is not binding unless all the material facts for ratification are in the possession of the party ratifying, does not apply in this case. This principle does not apply where there is an intentional and deliberate ratification, nor does it apply where the circumstances are such as reasonably to put the principal upon inquiry. This doctrine is squarely decided in *BALLARD vs. NYE*, 138 Cal. 598; also *MECHEM on AGENCY*, Sec. 148.

Speaking of the general rule that a party must have full knowledge of all of the material facts before the doctrine of ratification can be applied, the learned Justice in *Ballard vs. Nye*, page 598, uses the following language:

"Ignorance of such facts, however, can avail nothing where it is intentional and deliberate, or where the circumstances are such as reasonably to put the principal upon inquiry." (*Mechem on Agency*, sec. 148). This rule is intended to protect the vigilant, not to aid those, who, advised by the situation and surroundings that an inquiry should be made, make none; and ignorance of the existence of facts which

might have been ascertained with ordinary diligence, is no protection. Where the situation naturally and reasonably suggests that some inquiry or investigation should be made, and none is made, the person failing to make it will be deemed in law possessed of such facts as the inquiry would have disclosed."

"It is well settled that the president or other general officer of a corporation has power *prima facie* to do any act which the directors or trustees of the corporation could authorize or ratify."

SUN PRINTING & PUBLISHING ASSN.
VS. MOORE, 183 U. S. 642, 651.

"In this case the president, having full personal charge of the business which the defendant was organized to transact, represented the corporation, and *prima facie* had power to do any act which the directors could authorize or ratify."

OAKES VS. CATTARAUGUS WATER
CO., 143 N. Y. 431, 436.

"When, therefore, the defendant admitted, on the trial of the case in hand, that Quinn was its president and superintendent and general managing agent, this was sufficient evidence of his authority to make the contract with the plaintiff, and *it was not necessary for the plaintiff to show any vote or other corporate act* constituting him the agent of the corporation. It would not be in accordance with justice or the interests of society to allow corporations to deny the au-

thority of such agents, or to repudiate contracts made by them for work and labor from which they derived benefit."

CROWLEY VS. GENESEE MINING CO.,
55 Cal. 273, 276.

In the case just quoted from the president of the defendant employed the plaintiff to work in a quartz mine belonging to the defendant, for the purpose of taking out rock and delivering it for crushing by the company at its mill, the plaintiff, as compensation for his services, to receive one half of the gross amount of the proceeds of each crushing, and the action was to recover the amount claimed by plaintiff to be due him under such contract.

Where one is financial manager of a corporation, his acts bind the company, and it cannot repudiate its liability therefor, by showing that he had in fact no authority.

CASE MFG. CO. VS. SOXMAN, 138 U. S.
431.

If the president of the corporation had authority to see to the doing of the work for which he made the employment, such fact gave him authority to engage the employee to do the work.

HENDERSON BRIDGE CO. VS. Mc-
GRATH, 134 U. S. 260, 274.

The presumption is that the president of the corporation was authorized to employ Mr. Anderson.

IN SUN PRINTING & PUBLISHING ASSN. vs. MOORE, 183 U. S. 642, 648, 651, the MANAGING EDITOR of a newspaper signed a contract on behalf of the corporation owning the newspaper for the chartering of a yacht for the purpose of collecting news concerning events connected with hostilities between the United States and Spain; the contract calling for a voyage by the vessel to Cuban waters, the vessel to be used as a dispatch boat for the purpose of gathering news, and the contract binding the newspaper company to return the yacht at the expiration of the term of hiring. While the yacht was engaged in the service in question, it was wrecked and became a total loss. The action was brought by the owner of the yacht to recover its value, the action being based upon the contract for the safe return of the yacht. Speaking of the power of the managing editor to make the contract, the court said: "The evidence establishes he exercised an unlimited discretionary authority in the collection of news for the Sun, making all pecuniary and other arrangements in respect thereto. Prior to the hiring of the Kanapaha he had, solely on his volition, hired vessels for the use of the Sun for periods of a week at a time. By whom he was vested with this authority does not appear with certainty, but in the absence of direct evidence we are authorized to presume that the authority was conferred, either directly or indirectly, by the trustees of

the association, in whom was lodged the power to manage the concerns of the company. * * * *
 Persons acting publicly as officers of the corporation are to be presumed rightful in office; acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are affirmative proofs of the latter. * * * * If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose; and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed.” ,

In *Pittsburgh C. & St. L. R. Co. vs. Keokuk & H. Bridge Co.*, 131 U. S. 371, it was said: “When a contract is made by any agent of a corporation in its behalf and for a purpose authorized by its charter, and the corporation receives the benefit of the contract without an objection, it may be presumed to have authorized or ratified the contract of its agent.”

LOUISVILLE N. A. & C. R. CO. VS. LOUISVILLE TRUST CO., 174 U. S. 573-574.

The authority of an officer of a corporation may be by parole and collected from circumstances. It may be inferred from the general manner in which, *for a period sufficiently long to establish a settled course of business, he has been allowed, without interference*

to conduct the affairs of the corporation. It may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors. Directors cannot, in justice to those dealt with, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect officers and make declarations of dividends. That which they ought, by proper diligence, to have known, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business.

MARTIN VS. WEBB, 110 U. S. 7, 14-15.

Where the president of a corporation is permitted to exercise full power and authority in the conduct and management of its business, and deals with the property and affairs of the corporation in such a manner and for such a length of time as to justify others with whom he transacts business in believing that he had authority to do the acts in the manner he does, such third persons have a right to deal with him on the presumption that he has such authority, and the corporation having knowledge of such acts, and of the manner in which the corporate business is transacted, cannot thereafter, to the injury and pre-

judice of such parties, deny his authority or disaffirm his acts.

G. V. B. MINING CO. VS. FIRST NATIONAL
AL (9th Cir.) 36 C. C. A. 634, 639-640, 95
Fed. 23.

“A corporation which suffers appearances to exist, and its officers and agents to so act, as to give one employed by such officers and agents reason to believe that he is so employed by the Company, becomes liable to such person as his employee to pay for the services rendered.”

COWLEY vs. GENESEE MINING CO., 55
Cal. 273, 276-277.

HENDERSON vs. WESTERN GAS MA-
CHINE CO., 8 Cal. App. 249.

“We think the rule to be well settled that the president and general manager of a going business concern may, by the custom and usage of the corporation, be invested with power to do a variety of things necessary to be done by some particular officer or agent in the usual and ordinary course of business.”

SPERLAZZO vs. OLIPHANT, 24 Cal. App.
at 83-84.

“When, in the usual course of business of a corporation, an officer has been allowed in his official capacity to manage its affairs, his authority to repre-

sent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business.”

STOKES vs. NEW JERSEY POTTERY
CO. 46 N. J. L. 237, 242.

“Corporations, as much as individuals are bound to good faith and fair dealing and the rule is well settled that they cannot by acts, representations, or silence, involve others in onerous engagements, and then turn around and disavow said acts and defeat just expectations, which their conduct has superinduced.

HACKETT vs. OTTAWA, 99 U. S. 86, 96.

CHICAGO R. I. & P. R. CO. vs. HOWARD,
7 Wall. 392, 413.

“The most that can be claimed is that the contract, as executed, was in excess of the power conferred by the board of directors upon the president; that it varied from the authority given him. In this respect the transaction does not differ from that of an agent of an individual who has exceeded his authority. That which a principal may authorize an agent to perform he may ratify when performed by the latter without authority. When, with full knowledge of all the facts involved a principal reaps the fruits of the unauthorized contract of his agent and for sometime yields acquiescence to its provisions, he will be

deemed to have ratified it, and will be estopped, as against one who has fully performed the contract on his part, from repudiating it to the injury of the latter. And this doctrine applies to corporations equally with individuals."

GRIBBLE vs. COLUMBUS BREWING
CO., 100 Cal. 71-72.

NEWHALL vs. JOSEPH LEVY BAG CO.,
19 Cal. App. 25-26.

GOODWIN vs. CENTRAL BROADWAY
BLDG. CO., 21 Cal. App. 377.

It is not necessary that the authority of Nones and Tatham should appear by the minutes of the corporation.

"The technical doctrine that a corporation could not contract, except under its seal, or, in other words, could not make a promise, even if it had been fully settled, must have been productive of great mischiefs. Indeed, as soon as the doctrine was established that its regularly appointed agent could contract in their name without seal, it was impossible to support it; for otherwise the party who trusted such contract would be without remedy against the corporation. Accordingly it would seem to be a sound rule of law that wherever a corporation is acting within the scope of the legitimate purposes of the institution, all parole contracts made by its authorized agents are express promises of the corporation;

and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie.”

BANK OF COLUMBIA vs. PATTERSON
ADMR. 7 CRANCH, 299, 306.

“Whatever doubt may once have existed on the point it is now settled beyond controversy that a corporation may be bound by the acts of its duly authorized agents in the same way that a natural person may be bound, and that a formal resolution is not necessary to establish an act *which can only be performed by a board or committee acting as a body.* (*Danforth v. Schokarie & D. Turnpike Road*, 12 Johns. 227; *Dunn v. Rector, etc., of St. Andrew’s Church*, 14 Johns. 118; *Bank of Columbia v. Patterson’s Administrator*, 7 Cranch, 299; *Bank of the United States v. Dandridge*, 12 Wheat, 64; *Corinne Mill, Canal & Stock Co., v. Toponce*, 152 U. S. 405; *Curtis v. Leavitt*, 15 N. Y. 1, 48; *Hooker v. Eagle Bank of Rochester*, 30 N. Y. 83; *Farmers’ Loan & Trust Co. v. Housatonic R. R. Co.*, 152 N. Y. 251; *Hall v. Herter Bros.*, 90 Hun, 280; *affd. on opinion below*, 157 N. Y. 694; *Bagley v. Carthage, W. & S. H. R. R. Co.*, 165 N. Y. 179; *Gaul v. Kiel & Arthe Co.*, 199 N. Y. 472, 476.) The foregoing cases show that a distinction cannot be made because of the size or character of the defendant.”

YOUNG vs. U. S. MORTG. & TRUST CO.,
214 N. Y. 279.

“The common law rule that a corporation has no capacity to act, or to make a contract, except under its common seal, has been long since exploded in this country. Even in England, it has been found to be impracticable, so that the classes of cases which constitute exceptions to the rule have become so numerous that the exceptions have almost abrogated the rule. In the United States nothing more is requisite than to show the authority of the agent to contract. That authority may be conferred by a corporation at a regular meeting of the directors, or by their separate assent, or by any other mode of their doing such acts. ‘If this were not so,’ says Mr. Chief Justice Redfield, ‘it would lead to very great injustice, for it is notorious that the transaction of the ordinary business of railways, banks and similar corporations in this country, is without any formal meeting or votes of the board. Hence, there follows a necessity of giving effect to the acts of such corporations, according to the mode in which they choose to allow them to be transacted.’ ”

CROWLEY vs. GENESEE MINING CO.,
55 Cal. 275-276.

STREETEN vs. ROBINSON, 102 Cal. 545-
546.

NEWHALL vs. JOSEPH LEVEY BAG CO.
190 Cal. App. 25.

G. V. B. MINING CO. vs. FIRST NATIONAL BANK (9th Cir.) 36 C. C. A. 640, 95 Fed. 23.

An agreement made by an agent of a corporation is a contract of the corporation, although made without any resolution of a board of directors, and although the seal used was the private seal of the agent, if the agent was authorized to execute it, or if the company ratified his act.

EUREKA CLOTHES WRINGING MACH. CO. vs. BAILEY W. & W. MACH. CO. 11 Wall. 488.

JACKSONVILLE, MAYPORT, PABLO R. & N. CO. vs. HOOPER, 160 U. S. 514, 521-522.

Employment of the defendant in error by the President of the Company, known to some of the directors of the company, and not repudiated, makes the contract that of the company. The passage of any resolution was not required.

SCOTT vs. S. S. OIL CO., 144 Cal. 140.

Plaintiff in error had knowledge of the employment of defendant in error before and during the performance of the work.

If full knowledge by the corporation was necessary, "it must be presumed that the corporation had full notice of all the facts which were known to its

President. The president of a corporation is a proper person to whom notice, which is to affect a corporation, is to be given. The corporation has no eyes, ears or understanding, save through its agents. The President is considered the head of the corporation, and it is his duty to report to the trustees information affecting the interests of the corporation. And the presumption is that he does so. Usually this is a conclusive presumption."

BALFOUR vs. FRESNO CANAL & IRRIGATION CO. 123 Cal. 397.

"Notice to the corporation agents who have authority to represent the whole Company is notice to the corporation."

BLOOD vs. LA SERENA LAND & WATER CO. 134 Cal. 370.

In the case just cited the action was to foreclose a mortgage executed on behalf of defendant by its president and secretary. No resolution authorizing the mortgage had been passed. It was claimed by defendant that the agent who represented the plaintiff in the sale of the land to the defendant had acted as its agent in the transaction without knowledge of the fact that he was plaintiff's agent. It was held however that if the president and secretary of the defendant had knowledge, such knowledge was the knowledge of the corporation defendant.

RATIFICATION.

That The Quicksilver Mining Company ratified the acts of its President and of its General Manager with reference to the electric railroad and the power company cannot be denied.

The facts upon this subject have been fully set forth heretofore.

The fact that Anderson's work had been completed at the time the ratifying resolutions were passed by the stockholders of the Quicksilver Mining Company, simply adds to the effect and strength of the resolution as a ratification. The resolution is an approval of all of the acts of the president in reference to the power company and the railroad, and necessarily includes the work done by Anderson, and the expenditures made by him. That Anderson was not aware of the passing of the resolution is entirely immaterial, for the only question is as to what the Company did.

It appears that the Mining Company paid practically all of the expenses connected with both the railroad and power company, except the Anderson bill, and, there is no pretense that this bill stood on any different footing from the other bills, or that there was any justification for the refusal to pay this bill while making payment of the other bills.

The Mining Company accepted the benefits and fruits of Anderson's labor and expenditures which constitutes ratification. The Company accepted all

the stock of the electric road and the power company. It could not accept the benefits and repudiate the burdens.

“A ratification can be made * * * where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof.”

CIVIL CODE SECTION 2310.

“A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting.”

CIVIL CODE SECTION 1589.

“A ratification supposes a knowledge of the thing ratified, and, in the case of a contract, the inference from the ratification is that its provisions were known. When the ratification is proved, this inference necessarily follows and, if there was any mistake or misapprehension, that fact must be known. There is no evidence of any mistake in this case, and we cannot infer that the Board knew nothing of the contracts except through the medium of the report.”

BIEN vs. BEAR RIVER & AUBURN W. &
M. CO. 20 Cal. 613.

There is no merit in the claim of counsel that there was no ratification of the Company's employment of Mr. Anderson, because there is no evidence that the

ratification by the Company was with the knowledge of all of the facts and circumstances of Mr. Anderson's employment.

We have already directed the Court's attention to the principle of law laid down in *Ballard vs. Nye*, 138 Cal. 598, where the learned Justice quotes with approval *MECHEM* on *AGENCY*, 148, as follows:

"Ignorance of facts, however, can avail nothing where it (the ratification) is intentional and deliberate."

In addition to this, it has been shown that the President of the Company made reports stating generally what was being done by him, and that the Company approved of the acts of its President in reference thereto, and ordered bills incurred by its President in such work paid by the Company, and accepted all of the capital stock of the railroad company and the power company, and actually paid all of the bills incurred for the work, except Mr. Anderson's bill. It may be true that the President did not in his report give the name of each and every person who had performed work, but such fact is of no importance and is entirely immaterial. The essential point is that the Company's Board of Directors, knowing that its President had made contracts regarding the making of the necessary surveys and the laying out of the electric road, and the obtaining of the necessary rights of way, ratified the acts of the President. The presumption is that the Board of Directors, in ratifying the acts of the President possessed full knowledge of what it was doing.

ULTRA VIRES.

This subject was treated by MR. JUSTICE BLEDSOE in his opinion in this case as follows:

“The claim is made and has been given careful consideration that the doctrine of *ultra vires* as applied to corporate activities is applicable here, and that it, in itself, will suffice to deny plaintiff a recovery. Assuming that the doctrine is applicable at all, still I am in thorough sympathy with the proposition that it has no efficacy in this case, because of the fact that the contract solemnly and deliberately entered into by defendant through its authorized agent, has been fully performed by the plaintiff on his part. It would now be in the highest degree unjust to permit defendant to reap the benefit of whatever advantages may have accrued from the performance of the contract by the plaintiff and then deny to the plaintiff the compensation agreed to be paid, because of the claim indulged in that the corporation had no ~~power~~ power to enter into the contract at all. This conclusion, I think, is sustained by the language and holding of the Supreme Court of the United States. *Eastern B. & L. Association vs. Williams*, 189 U. S. 122.

“I do not feel, however, that the doctrine of *ultra vires* is necessarily involved. Plaintiff was not employed to build or operate a railway or to build or operate a power or water plant. He was merely employed to secure options looking to the development of a water supply and water right already on the

property of the defendant, and to secure rights of way by deed or otherwise for a railway, leading from defendant's property to the city of San Jose, and the operation of which, both as to carriage of freight and passengers, would presumably and probably directly aid and benefit defendant's property and defendant's business. New corporations were in fact organized, which said corporations were to conduct these respective businesses; but plaintiff was employed, and he rendered his services not in the organization or the conduct or control of such new corporations and new businesses, but in the taking of certain preliminary steps looking to the transaction of these new businesses when the proper and adequate machinery had been provided. In so far as the inceptive features were concerned, however, these preliminary steps had to be taken, and in my judgment were properly taken by the defendant itself, because of the fact that its property and its business was thereby to be benefited. Under the circumstances, therefore, the taking of these necessary preliminary steps was within the competency and the power of defendant corporation, and the plea of *ultra vires* is not sustained. *Brown vs. Winnisimmet*, 11 Allen, 326; *Fort Worth Civic Company vs. Smith Bridge Company*, 151 U. S. 294. (50-51).

The "water rights" in the Almaden Creek was the property of The Quicksilver Mining Company. Can it be successfully contended that, under the corpor-

ation's charter, it could not improve—perfect and market this very valuable asset?

If it were essential, advantageous or economical for the Company to secure better, more efficient and cheaper transportation, resulting in a saving to the Company over the outlay—can it be successfully claimed that the charter of the corporation would preclude the construction of a modern electric road? The means of transportation has changed with the progress of time. In the earlier days this same corporation was as antiquated as were the old Mexicans, and used burros for transporting its ore. The charter of this corporation does not inhibit it from keeping abreast with the march of progress and competition. Its counsel would force it to keep the burros.

The great fault of counsel's argument is due to the fact that he cannot realize that the enterprises undertaken were a part of the business of his corporation. If the enterprises were distant and disconnected with the properties of the corporation, counsel's argument might carry some weight.

We wish to call attention to the significant fact, that three other lawyers connected with his Company and with all the projects involved,—did not concur with counsel's views on this subject. At a meeting of the Board of Directors in New York on June 5th, 1911, the President was authorized to have a Mr. Aaron, the Company's New York Counsel, prepare

resolutions in reference to the first Power corporation. (238). We find no expression from him that the doctrine of *ultra vires* applied. Mr. Swayne, a lawyer of New York, and the Director who testified that the Senonac Power Company was a subsidiary Company to The Quicksilver Mining Company, never uttered a syllable about *ultra vires*. D. M. Burnett, Esq., the local counsel for the Company, was an organizer and director of each of the two subsidiary companies. He must have been of an opinion contrary to that of counsel.

“We know of no rule or principle by which an act creating a corporation for a certain specific object, or to carry on a certain trade or business is to be strictly construed as prohibitory of all other dealings or transactions not coming within the exact scope of those designated. Undoubtedly the main business of a corporation is to be confined to that class of corporations which properly appertain to the general purposes for which its charter was granted, but it may also enter into and engage in transactions which are incidental or auxiliary to its main business, or which may become necessary, expedient or profitable in the care and management of the property which it is authorized to hold under the act by which it was created.”

BROWN vs. WINNISIMMET CO. 11 ALLEN 326.

JACKSONVILLE, MAYPORT, PABLO R.
& N. CO. vs. HOOPER 160 U. S. 514, 525-
526.

“Whether a contract is essential to the transaction of its ordinary affairs or for the purposes of the corporation is to be determined by the corporation or those to whom the management of its affairs are intrusted. If it is within the apparent scope of the organization the fact that the contract has been entered into by it or by its representative, is a determination on the part of the corporation that it is essential, and the corporation will not be permitted thereafter to question its effect.”

BATES vs. CORONADO BEACH CO. 109
Cal. 160, 163.

“A corporation created for the purpose of dealing in land, and to which the powers to purchase, to subdivide, and to sell, and to make any contract essential to the transaction of its business has been granted, possesses the incidental power to incur liability for building a bridge upon a public street, across a river, to secure better facilities for transit to and from the lots of lands which it is its business to acquire and dispose of.”

FT. WORTH CITY CO. vs. SMITH
BRIDGE CO., 151 U. S. 294.

IN VANDALL vs. SOUTH SAN FRANCISCO DOCK CO., 40 Cal. 83, the defendant was incorporated under the laws of the State of California "to buy, improve, lease, sell, and otherwise dispose of real estate," in and near South San Francisco. The defendant purchased a tract of land in the vicinity of South San Francisco, and entered into an agreement with another corporation, which was engaged in constructing a railroad from the City of San Francisco proper to the vicinity of the defendant's property, by which agreement the railroad company bound itself to increase the width of its road and the frequency of the trips of its cars over it, and to reduce the price of passage over it about fifty per cent, and to maintain those conditions for a period of ten years, and the defendant agreed to pay the railroad company as a consideration for such concessions the sum of \$20,000.00. The action in question was brought by the stockholders of the defendant corporation to enjoin the sale of their stock under assessments levied by the defendant for the purpose of raising money to pay the agreed amount to the railroad company. The plaintiffs insisted that under its act of incorporation the defendant had no power to expend the money of the corporation for such purpose, and that, therefore the assessment was void. The defendant, on the other hand, contended that under the authority given it by its certificate of incorporation to improve its property, it had the right to do every act, the direct and immediate tendency of

which was to benefit or enhance the value of its property, and that the agreement in question did improve the value of its property. Held that the agreement in question was within the incidental powers of the defendant corporation and that therefore the assessments were valid.

In *TEMPLE STREET CABLE RY. vs. HELLMAN*, 103 Cal. 634, it was held that a street railway corporation has power to execute a promissory note to the conductor of a baseball park in consideration that he would discontinue his former place of business and establish a baseball park on a tract of land adjacent to the land of the street railway with a view to increase the business of the street railway.

ESTOPPAL.

The company, having accepted the benefits of all of the work done in regard to the railroad and power concerns, and particularly the benefit of the work done by Anderson and of the expenditures made by him and, having taken to itself the capital stock of the railroad company, and of the power company, and, having recognized its liability for the work in question by paying, mostly, directly through its New York office, all of the expenses connected therewith, except the account of Anderson, which is of the same character as the other claims paid by it, the company cannot now be heard to raise the question of *Ultra Vires*.

“It is well settled in relation to contracts of corporations that where the question is one of capacity or authority to contract arising whether on the question of regularity of organization or of power conferred by the charter, the party who has had the benefit of the contract cannot be permitted, in an action founded upon it to question its validity. ‘It would be in the highest degree inequitable and unjust’ says Mr. Sedgwick, ‘to permit the defendant to repudiate a contract, the fruits of which he retains.’ ”

ARGENTI vs. CITY OF SAN FRANCISCO,
16 Cal. 255, 264-265.

A corporation is liable on its promissory note, the consideration of which it has received and retained, although the note was executed in pursuance of a contract *Ultra Vires*.

MAIN vs. CASSERLY, 67 Cal. 127.

“The law of the subject is thus expressed in *Bradley vs. Bradley*, 53 Ill. 413; ‘While a contract remains executory, the powers of corporations cannot be extended beyond their charter limits for the purpose of enforcing it. Not only so, but on application of a stockholder or of any other person authorized to make the application, a Court of chancery would interfere and forbid the execution of a contract *Ultra Vires*. But if one of the contracting parties proceeds in the performance of the contract, expending his money and his labor in the production of value, which

the corporation appropriates, we can never hold the corporation excused from payment on the plea that the contract was beyond its power. In cases of such character, courts simply say to corporations, You cannot, in this case, raise the question of your power to make the contract. It is sufficient that you have made it, and by so doing, have placed in your corporate treasury the fruits of others labors, and every principle of justice forbids that you be permitted to evade payment by an appeal to the limitations of your charter.' ”

In *BLOOD vs. LA SERENA L. & W. CO.*, 134 Cal. 361, 367, it was said: “Assuming that the contract of purchase was *Ultra Vires*, the law does not allow a corporation to retain the benefits which it has received from the contract and escape liability upon it.”

In *MAGEE vs. PACIFIC IMPROVEMENT CO.*, 98 Cal., 678, 681, it was said: “The proposition of the defendant that because inkeeping is not enumerated as one of the objects of its incorporation, its acts as an inkeeper are *Ultra Vires*, and cannot form the basis of any liability therefor, cannot be maintained. Having engaged in that occupation, the defendant cannot now repudiate its obligation upon the ground that under its corporate powers it was not authorized to engage in such occupation.”

In *PAULY vs. PAULY*, 107 Cal. 8, 19, it was held that a corporation must account to a contractor for

the benefits received under an Ultra Vires contract.

In *McQUAIDE vs. ENTERPRISE BREWING CO.*, 14 Cal. App. 319, it was said: "The doctrine of Ultra Vires, when invoked by a stockholder of a corporation, or in quo warranto proceedings by the State, particularly as to executory contracts, and in violation of its charter, or entirely outside the scope and purpose of its creation, is looked upon quite differently than it is when relied upon by a corporation as a shield to escape its just liability under an executed contract. In such cases the courts simply consider the facts as to the circumstances of the contract, as to whether or not the corporation has received benefits under it; as to whether or not the doctrine of estoppel in pais may be invoked. Such defense introduced against a contract which has been executed wholly or in part by the corporation, is looked upon with disfavor, and particularly of late years when corporations have multiplied until they control and operate all kinds of business, and in many cases, to the exclusion of individuals. The rule is based upon the strongest principles of justice and public policy, that a contract shall be enforced against a corporation when it has received the consideration or the benefits of the contract."

The same doctrine is held in the State of New York.

WHITNEY ARMS CO. vs. BARLOW, 63 N. Y. 63, 70.

LEINKAUF vs. LOMBARD, 137 N. Y. 418,
423.

HOLMES vs. EASTERN BUILDING &
LOAN ASSN., 172 N. Y. 508.

The policy of the United States courts is also against the claim of *ultra vires*.

“The doctrine of *ultra vires*, whether invoked for or against a corporation, is not favored in the law. It should never be applied where it will defeat the ends of justice, if such a result can be avoided.”

SAN ANTONIO vs. MEHAFFY, 96 U. S.
312, 315.

OHIO & MISS. RY. CO. vs. McCARTHY, 96
U. S. 258, 267.

The doctrine of *ultra vires* is not usually applied when the party setting it up has received a benefit from the unempowered and unlawful act relied on as a defense.

UNION GOLD MINING CO. vs. ROCKY
MOUNTAIN NATIONAL BANK, 96 U.
S. 640.

In a case where parties, who were about to organize a corporation, but had not yet filed its articles of incorporation, as required by statute, so that the corporation had no power to transact business, ordered and received goods, it was held that: “The corpora-

tion having assumed, by entering the contract with plaintiff, to have the requisite power, both parties are estopped to deny it."

WHITNEY vs. WYMAN, 101 U. S. 392, 397.

In Eastern Building & Loan Association vs. Williams, 189 U. S. 122, 129, the Court quotes with approval from an opinion of the New York Court of Appeals: "We deem it unnecessary at this time to determine whether the defendant was authorized by that statute to enter into such contracts, for if we assume that the making of them was in excess of the express power conferred upon the corporation by that statute, still, as the contracts involve no moral turpitude, and do not offend any express statute, they are not illegal in a sense that would prevent the maintenance of an action thereon. It is now well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been, in good faith, fully performed by the other party, and the corporation has had the benefit of the performance, and of the contract. As has been said, corporations, like natural persons, have power and capacity to do wrong. While they have no right to violate their charter, yet they have capacity to do so, and are bound by their acts where a repudiation of them would result in manifest wrong to innocent parties, and especially where the offender alleges its own wrong to avoid a just responsibility. It may be that, while a contract remains unexecuted upon both sides,

a corporation is not estopped to say in its defense that it had not the power to make the contract sought to be enforced yet when it becomes executed by the other party it is estopped from asserting its own wrong, and cannot be excused from payment upon the plea that the contract was beyond its power.’

American National Bank vs. National Wall Paper Co., 23 C. C. A. 33, 77 Fed. 85.

In U. S. Savings & Loan Co. vs. Convent of St. Rose, 66 C. C. A. 416, 418-419, 133 Fed. 354, it was said by the Circuit Court of Appeal for this circuit, speaking of the claim by the defendant that the contract was beyond its powers to make and, therefore, *ultra vires*, “Appellee has received the fruits and benefits of the contract, but has not paid all of the money agreed to be paid thereon by the terms of the written contract. Can it now successfully defeat the contract by the plea of *ultra vires*? It must be remembered that we are called upon to deal directly with the rule as applied to private corporations, where the contract has been fully executed by the party against whom the plea of *ultra vires* is in effect as distinguished by the rule which is applied to cases of executory contracts or contracts made by public or *quasi* public corporations, which owe corporate duties to the public. The general rule applicable to the case in line is expressed in 5 Thompson on Corporations, Sec. 6016, as follows: ‘The great

mass of judicial authorities seems to be to the effect that where a private corporation has entered into a contract in excess of its corporate powers, and has received the fruits and benefits of the contract, and an action is brought against it to enforce the obligation on its part, it is estopped from setting up the defense that it had no power to make it."

The facts of record in this case, and the law applicable thereto, uphold and sustain the position of the trial Court and every expression contained in the learned Judge's opinion; and a contrary conclusion would result in the defeat of a just and legal cause. Confident that we have overcome every argument of counsel for plaintiff in error, and have shown that there is no merit in the defense made by the Company against Mr. Anderson's claim for his services and moneys expended, we feel, however, that it may be advisable to discuss certain minor matters found in the brief for plaintiff in error. We do not desire to be charged with having passed them because of an inability to respond to them.

Counsel stated that it is conceded by us that there was no express authority conferred upon Nones by the mining company to employ Anderson for any purpose, nor was the employment of Anderson ever authorized or ratified by the mining company. We emphatically deny that we ever at any time made such a concession, and we assert that the record shows to the contrary. We do not say that by any

resolution entered upon the minutes of the Company, or by any vote taken by the Board of Directors, that Mr. Anderson was expressly employed by the mining company. The mining company did not pass a resolution by its Board of Directors, nor did it enter any such resolution upon its minutes, whereby it employed Civil Engineer Hermann to survey the right of way for the proposed railroad, or whereby it employed the firm of Smith, Emory & Company to survey and make maps and plans for the erection of the dam with reference to the power company, nor whereby it employed laborers and foremen of laborers to cut down grades along the line of the proposed railroad. It was not necessary that the employment of Mr. Anderson, or any of these other men, should be by vote of the Board of Directors and entered as a resolution upon the minutes. I am strongly of the belief that learned counsel will not be able to find any endorsement upon the minutes, or any action of the Board of Directors showing the appointment of Tatham as general manager. Tatham, nevertheless, was general manager, and acted as such during all this long period of time.

It is not true that we concede, or ever conceded, that the employment of Anderson was not authorized or was not ratified. We have shown clearly that the employment was authorized, and not only was it authorized, but it was ratified. It was authorized expressly by all of the Directors residing in the State

of California; it was authorized ostensibly and impliedly by all of the Directors and Stockholders; it was ratified by all of the Directors and Stockholders.

What process of reasoning does the learned counsel for plaintiff in error, hope to adopt by which he expects to convince a fair mind that the taking over of all of the stock of an organized corporation is not the receipt of something of value? The perfection of the mining company's water rights, so that the same were salable, necessarily demanded that there be no infringement upon the rights of adjoining property owners; and the guarding against such a contingency was a necessity before the stock of the water company owned by the plaintiff in error would have been marketable.

When the plaintiff in error took over the stock of the railroad company it acquired a property of considerable value, and this due entirely to the efforts and expenditures of Mr. Anderson. It is a matter of common knowledge that rights of way and a public franchise for an electric road, through such a community as has been described, are acquired only after the expenditure of much time, money and the continuous and persistent services of competent and efficient employees. All of these rights acquired by the mining company, upon becoming the owner of the stock of the Railroad Company ought reasonably to have been of a marketable value of several thousands of dollars. The value of both of these enterprises

was contributed to and produced to a great extent by Mr. Anderson. It seems a falacious argument to contend under these circumstances that plaintiff in error did not receive the benefits of the services rendered. If the mining company did not see fit to preserve these assets, if they did not develop them, or if disaffection among the stockholders obstructed the sale, it is no fault of Mr. Anderson.

Criticism seems to be made of defendant in error because he was not crowding for his claim upon the completion of the services. Mr. Anderson had full faith in the declarations of the President and the General Manager of the Company, as well as in the Attorney for the Company, all three of whom were Directors. He was informed that the stock of the Water Company was to be sold, and he would then get his money. He was told by Nones that the rails, ties and fish plates had been bought for the Railroad, and that when the road was built he would get his money. Having confidence in Nones, he naturally waited, expecting that within a reasonable time the sale would be consummated, and that the road would be built. We were lulled into a state of confidence by the actions of plaintiff in error, and because of this fact, we are now criticized by plaintiff in error for the position that it put us in. That it was perfectly proper to present a claim to Tatham, the General Manager, is very apparent. Tatham says: "I did not send it (Anderson's bill) to New York because I usually paid bills from this end." (126).

We are again criticized by counsel for the mining company because the mining company's general manager was guilty of a direlection in the eyes of counsel.

It is charged that when Mr. Anderson took a trip to Randsburg, in the southern part of the state of California, to procure an option with reference to the water rights, that he took the option in the name of C. P. Anderson & Co. This is only conclusive evidence of the fact that he was obeying the directions given by Nones, and no other inference can be drawn therefrom. Quoting from the testimony we find the following: "Nones didn't want any one to know the purpose of the options until the deal had been consummated." (54).

When Nones was selling a portion of the lands belonging to the Company, the fact that he engaged Anderson as a broker, and the fact that Anderson received commissions for selling these lands, has no connection with the present controversy. The fact that at the time the various sales of these lands were consummated, the Board of Directors furnished resolutions authorizing the sales accompanying the deeds, which resolutions were criticized or passed upon by the attorneys for the purchasers, could not possibly have had any significance to Mr. Anderson, or to any one else, with regard to his employment in the matters at issue. All real estate brokers are familiar with the fact that such resolutions are uniformly required when conveyances of real estate are made from corporations. This fact would have no

sifnificance to any one engaged to render services in procuring franchises, options and rights of way.

Counsel says—how explain the written promise of Nones to pay Anderson \$4500 for services in the railroad matter? As heretofore stated, this instrument was handed to Mr. Anderson in the office of the attorney for the Mining Company in the handwriting of Mr. Tatham, the General Manager of the Company, and signed by Nones, its President. Considering the relationship between all of the parties, it was very natural that Mr. Anderson should have received it from them with the full belief that it was the intent and purpose of the parties that this should be paid by them as the representatives of The Quicksilver Mining Company.” Nones testified that this was merely his guarantee to Mr. Anderson for Anderson’s “services for The Quicksilver Mining Company.” (210).

The declaration made by counsel that the evidence disclosed that no benefits were received by plaintiff in error, but that it suffered actual loss, in the correct sense, is an absolutely erroneous statement. When the corporation acquired the fruits of Anderson’s labor, it received the benefits, and it then possessed properties of value; that it subsequently neglected these properties; that it squandered its opportunities, does not render us responsible for its improvidence.

The president was authorized by the mining company to sell the stock and securities of the Senonac

Power Company “*at a price of not less*” than \$200,000 in cash or its equivalent, (249), instead of *for the sum of* \$200,000 as stated by counsel. Because of the fact that Nones was negotiating the sale for the sum of \$325,000, which would have accrued to the benefit of the mining company, counsel for plaintiff in error in his brief at page 51 is desperate enough to go out of the record and make the declaration, that Anderson and Nones together would have unlawfully appropriated this \$125,000 to their own use, had Nones been successful in selling the property of the corporation of which he was president. How counsel can justify himself in making this charge against Mr. Anderson is more than we can comprehend. The sale was being negotiated by Smith, Emory & Company, who are well known and respected. ~~Mr. Anderson had absolutely no connection~~ sible brokers and engineers of San Francisco of high standing and repute. Mr. Anderson had absolutely no connection with any negotiations or prospective sale of the stock of the Senonac Power Company. Learned counsel has personal knowledge of the unimpeachable character and strict integrity of the gentlemen he thus charges without warrant with these corrupt motives.

In closing this brief, we desire to record the expression that the opinion rendered by the learned trial judge is a just and righteous interpretation of the facts and construction of the law. The conten-

tions and claims of plaintiff in error in this whole litigation are without merit, and the appeal is unwarranted.

With full confidence that the judgment of the trial Court will be sustained our cause is respectfully submitted.

B. A. HERRINGTON

Attorney for Defendant in Error.

Dated: May 24th, 1917.

4
No. 2941

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

THE QUICKSILVER MINING COMPANY (a corporation), <i>Defendant and Plaintiff in Error,</i> VS. C. P. ANDERSON, <i>Plaintiff and Defendant in Error.</i>	}
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REPLY BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

A. H. JARMAN,
Attorney for Plaintiff in Error

Filed

JUN 22 1917

Filed this.....day of June, 1917.

F. D. Monckton,
Clerk

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2941

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THE QUICKSILVER MINING COMPANY

(a corporation),

Defendant and Plaintiff in Error,

vs.

C. P. ANDERSON,

Plaintiff and Defendant in Error.

REPLY BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

We will answer the brief of defendant in error in the order in which it is made, indicating where necessary the pages to which our reply is directed.

We believe that defendant in error stated away his case under the heading "The Cause" (p. 4).

Nones was the president of a great mining corporation, capitalized at \$10,000,000, with a production record of upwards of \$150,000,000. The Mining Company has been actively engaged in mining since 1866—the mine itself has been operated for upwards of 100 years. The Mining Company operated this vast mining property for more than forty

years under the direction and management of such able engineers as Randol and Derby, yet it remained for Nones, who was not a mining engineer, to discover the alleged "*necessity*" for the development of the company's water power, the like necessity for acquiring adjoining lands so as to augment that which the Company already owned,—not because the Company needed the additional water or power that might be generated therefrom, for its business of mining—but simply that it might sell same for a profit; it remained for Nones to discover the alleged "*necessity*" for an electric "*railroad*" from San Jose to New Almaden, although the Southern Pacific Company had a branch line within two miles of the mine, and has for years operated and now operates its trains for the accommodation of the Mining Company.

The question of "*necessity*" was and is a fiction of Nones' imagination, and was brushed aside by the learned trial judge as unworthy of serious consideration (Tr., pp. 118-119).

Had Nones undertaken the construction of an electric railroad to connect up the company's property with the Southern Pacific line, there might be some plausibility to the contention of the defendant in error that such an enterprise was "*necessary*" as an incidental power in the successful operation of its mine—but no such idea actuated him, and the services performed by Anderson were not so intended or so limited. Simply because an electric railroad carrying passengers, freight and mail

might prove of convenience to the Mining Company in its business will not legitimatize such an enterprise and include it as an incidental power necessarily granted by its charter.

Accepting defendant's in error statement as to the "Cause", we submit that such statements as:

"Nones * * * recognized * * * great commercial value * * * water rights * * * power purposes * * * irrigating * * * orchard lands of Santa Clara County * * * he concluded * * * electric railroad * * * a necessity * * * I * * * believe it * * * a necessity",

do not constitute proof that either or both enterprises were in fact a necessity or necessary to the Mining Company in its business. Testimony to this effect is merely evidence of Nones' opinion and has no legal or probative value. It was and is the prerogative of the Mining Company to determine this necessity.

Whether an incidental power is necessary is a question for the corporation and not for its agents. The opinions or declarations of agents are not competent to establish the necessity for the exercise of such powers. Nones was not qualified to express an opinion on such a subject, nor did he pretend to be. The burden of proof rested on defendant in error—he having failed to establish a proper determination by the corporation itself, for the exercise of these concededly implied powers—this case stands without proof that either the railroad or power projects were necessary or incidental to the

powers granted to the Mining Company by its charter.

On pages 4 and 5 counsel says:

“In April, 1910, * * * Nones * * * explained what was wanted * * * in securing * * * control of water rights and power rights * * * Mr. Anderson accepted the offer made him and entered upon this undertaking about April, 1910.”

At this time, Anderson made no inquiry as to Nones' authority to employ him for a purpose obviously different from the Mining Company's usual and ordinary business. He went ahead without knowledge of any kind, save and except the bare fact that Nones was president of the Mining Company. There is no pretense on the part of Anderson that at this time, April, 1910, he was warranted in dealing with Nones in the belief that he had authority to bind the Mining Company, as there is no evidence of express authority and there is no evidence that the Mining Company had at this time ever done anything or suffered anything to be done by Nones—from which Anderson or any other person would be warranted in believing that he possessed authority to engage in such enterprises.

In our opening brief we submitted authorities, not controverted by the defendant in error, to the effect that a president of a corporation has no power merely because he is president to bind the corporation by contract; that he possesses only such powers as has been given him by the by-laws and the board of directors and

“such other power as may arise from his having assumed and exercised the power in the past with the apparent consent and acquiescence of the corporation.”

Black v. Harrison Home Co., 155. Cal. 121.

There is no evidence of any power conferred upon Nones by the by-laws or by the board of directors. There is no evidence of power arising constructively from anything assumed or done by Nones in the *past*, as there is not a word of testimony in the record of any fact or event prior to Anderson's employment, other than the bare fact of Nones' election as president in June, 1909. This being so, it is idle to discuss the remaining essentials—*apparent consent and acquiescence* by the corporation.

So as to the services performed for the proposed electric railroad—there is no evidence of *prior* facts from which Nones' authority could be inferred, there is no evidence of anything done or of authority assumed from which an implied authority might be predicated.

The only testimony in this regard is that of Anderson, himself, as to the alleged declarations by Nones. In our opening brief (p. 79) we quoted the rulings of the learned trial judge that agency cannot be proved by the declarations of the agent.

Summarized, the most that can be made out of the case for the defendant in error is, that without knowledge or inquiry as to Nones' authority, An-

derson entered upon the performance of the duties alleged in his complaint, to-wit:

“To do certain work and labor and to perform certain services in the matter of organizing two certain corporations, which said corporations are denominated and known as the San Jose and New Almaden Railroad Company and the Senonac Power Company. That said employment covered the organization of said corporations by plaintiff, the assistance of plaintiff in carrying on the business of said corporations, the services of plaintiff in securing options for the purchase of property and rights of way for a railroad, and the purchase of property and options, for the purchase of property and water rights and rights of way for said power company, and doing and performing of such other matters and things as might from time to time be required by said defendant in connection with the purposes for which said corporations were to be and were organized.” (Tr. pp. 1 and 2.)

Having thus dealt with Nones, he did so at his peril.

Fontana v. Pacific Can Co., 129 Cal. 51.

WITNESSES.

(pp. 7-10.)

Counsel for defendant in error has gone somewhat outside of the record. The depositions of the witnesses, taken in New York, were introduced in evidence by defendant in error as a part of *his* case, *before* any other testimony had been introduced or offered in his behalf (Tr., p. 53).

We know nothing of Mr. Marshall or Mr. Blandy, except that as lawyers they appeared for and represented defendant in error in the taking of the depositions. Otherwise the record is silent as to them.

It is dogmatically asserted that there is a marked conflict found in the testimony given by Nones himself, and had Nones testified with truth and frankness—yet no attempt is made by learned counsel to point out that conflict, or to specify the testimony which in any way indicates a lack of truth and frankness.

It is stated that Nones was an unfriendly witness to defendant in error, yet no fact or circumstance is noted to substantiate this claim.

Dogmatic assertion is not argument, and proves nothing.

If Nones was unfriendly to any of the parties he was and is unfriendly to the Mining Company. The fact that he was ousted as its president, that he was under fire by its stockholders, and that he received a great deal of unpleasant notoriety when he was dismissed by the Mining Company, if anything, tended to make him unfriendly to plaintiff in error.

When he gave his testimony he was not a stockholder, nor in any way interested in the Mining Company. There was then no reason why Nones should in the slightest degree favor the Mining Company by his testimony.

Nones testified truthfully. There is no indication of false testimony in a single particular. His testimony is corroborated by documentary evidence and by the witnesses.

Whatever our opinion may be of Nones' business or executive ability as the head of a great mining corporation, we respect him for observing his oath and testifying truthfully when compelled to do so.

If there was and is a conflict in Nones' testimony, sufficient to discredit him as a witness for the defendant in error, and to render his testimony worthless and unworthy of belief, such conflict should have been pointed out in the reply brief and not left for this court to discover in a three-hundred-page record.

On page 9, counsel says:

“Counsel in his brief takes up the remarks of the court, for the purpose of indicating the court's mind at the time of the trial.”

Including this discussion in the record and in our brief was *not* for the purpose of indicating the court's mind at the time of trial on the merits of the case, nor to indicate any construction of the evidence at the time of the ruling. It was inserted because:

(1) It presents clearly and correctly the theory of the trial in the court below;

(2) Because the rulings on the objections made are fundamental and sound;

(3) Because we believed it would give this court a better idea of the case.

The soundness of the rulings and the legal principles necessarily included are not challenged by defendant in error—this being so, this court may safely accept them as the law of the case.

The only conflict in the testimony is between Anderson and Nones.

Anderson testified to alleged declarations by Nones. Nones denied making any such. What does this conflict amount to? An assertion and denial of incompetent evidence. Even if Anderson's testimony be conceded, yet it would not be legally sufficient to prove the authority of Nones to bind the Mining Company. There was, therefore, no conflict of material evidence which the lower court was called upon to determine.

As stated in our opening brief, the real question for determination is whether the Mining Company impliedly authorized or conferred authority on Nones to undertake in its behalf the railroad and water enterprises. In that the declarations of the alleged agent are not sufficient to prove it—we must look to "*other evidence*" in the record to prove the agency.

In our opening brief we stated that there was no evidence of express authority conferred on Nones to engage in these enterprises. Learned counsel for defendant in error contends other-

wise—yet he fails to direct attention to the evidence supporting his contention.

If the Mining Company is liable to defendant in error for the services performed by him, it is because it impliedly conferred authority on Nones to engage his services for the matters in which same were rendered.

In our opening brief we stated the law applicable to this case. We again repeat:

*“It is an elementary principle of corporation law that a president of a corporation has no power merely because he is president to bind the corporation by contract. * * * The president has only such power as has been given him by the by-laws and by the board or directors, and such other power as may arise from his having assumed and exercised the power in the past with the apparent consent and acquiescence of the corporation.”*

Black v. Harrison Home Co., 155 Cal. 121.

There is no evidence in the record and the learned counsel for defendant in error has not directed our attention to any evidence from which the trial court could find an implied authority because of assumption or exercise of power in the past with the apparent consent and acquiescence of the corporation.

Apparent consent and acquiescence implies that the directors must have had knowledge of such assumed powers.

AUTHORIZATION, EXPRESS OR IMPLIED.

(pp. 10-12.)

Under this heading counsel states that Nones and Tatham had complete charge of the business of the Mining Company in the State of California, and that no business involving the properties of the Company could be transacted, so far as the public was concerned, other than with Nones and Tatham. Quite true,—that is what they were elected to do;—*to transact the company's usual and regular business*. They had full authority to represent and bind the Mining Company in all usual and ordinary matters in the routine of its regular business. They had complete charge of its mining property and of its mining operations, and no transactions respecting the Company's usual and ordinary business, whether transacted by Nones and Tatham or by their successors, has ever been questioned or disputed.

What difference did it make that defendant in error did not know the members of the board of directors of the Mining Company. He had to know at his peril that the Company's representatives had the requisite authority to engage in the matter in which he was interested. A two-cent stamp would have gained the information in a reasonable time—a telegram would have advised him in a few hours.

It is the unusual, extraordinary, unexpected, unanticipated business, entirely different from and outside of the scope of its usual and ordinary

business in which it has engaged, for more than forty years, that we complain of. By no stretch of the imagination can the construction of an electric railroad or the acquiring and development of great water rights be deemed the usual and ordinary business of a mining company.

On page 11 counsel quotes from the opinion of the learned trial judge, to wit:

“There is no doubt but that plaintiff was employed by Nones, the apparent supreme directive head of the destinies of the corporation, to perform certain services for and in behalf of the corporation * * * that such employment was had with the knowledge of Tatham, etc.”

The vice of the decision of the court below is found in this brief paragraph. So far as the record in this case is concerned, it is not questioned but that Nones was the supreme directive head of the Mining Company. *Only, however, as to its regular and usual business.* That Tatham knew anything about it is of no consequence. True, he was a director, but he never attended any meeting while he held office. There is not even the pretense that a *majority* of the board of directors had knowledge of these matters.

Necessarily, there must be some limitation upon the powers of the officers and managers of corporations which conduct business operations at some distance from the Company's principal office and

place of business. If this is not possible, then all foreign corporations engaged in business in other states will be at the mercy of their representatives. Merely because the board of directors of a corporation elect a president to take charge of and operate and conduct its business, and a general manager to assist, is the corporation to be bound by *every wilful or fanciful engagement* which its representatives might choose to engage in, merely because *they* believe that it might be of some benefit to the corporation? If the corporation is to be bound merely because its representatives have attempted to engage in such matters, without the knowledge or acquiescence of the Company, then there will be a contraction of business enterprises and a great hardship upon new and undeveloped countries.

Such a rule, of course, is impossible. The law is clear and concise. A corporation is *only* responsible for the acts of its officers and agents within the scope of their authority, either express or implied. If there is express authority or if the corporation has impliedly held out its agent as possessing the requisite authority, and has knowingly acquiesced or participated in the results, then of course it is liable.

If it has not done so, then under no principle of law can it be held liable for the unauthorized acts of its agents.

NONES.

(pp. 12-17.)

Under this heading counsel states that Nones was in effect the entire board of directors. This is mere argument and finds no support in the evidence.

While we have only included in the record on this appeal a very small portion of the minutes of the Mining Company (Tr. pp. 231-260), it is apparent that the Mining Company had a board of directors that met and acted upon a great many matters, and that it actively participated and governed and regulated its affairs.

At the bottom of page 13 a portion of Miss Bowes' testimony is quoted, to wit:

"I cannot remember any disapproval of any of his executive acts as president."

The first question on redirect examination, she answered:

"Controversies often came up; I cannot remember just what was approved or disapproved, something that comes up is not always approved."

Turning to the minutes of the board of directors of September 20, 1911, in which is included a written report by Nones recommending and inviting the board to the serious consideration of the proposed electric railroad, we find the resolution of the board requesting full information *before taking action*.

There is no evidence in the record of complete control or domination of the board of directors

by Nones. Naturally, any board looks to its president and usually follows his suggestions. In this case Nones was actively engaged in looking after the affairs of the Mining Company. He visited its property and was actively engaged in its affairs. We know of no reason why a board of directors should not look to its president for guidance and information concerning the Company's affairs.

This Mining Company had continuously for more than forty years operated its mining property at New Almaden in exactly the same manner as during the Nones administration, and it is today pursuing the same method. Its president and general manager have full and complete charge of all its mining activities.

Whatever participation Tatham had in these enterprises is not binding on the Mining Company for there is no pretense that he was authorized, expressly or impliedly, to engage in these matters for and in behalf of the Company. That Tatham was a useful and pliable treasurer, and that he, as such, wasted and squandered the Company's funds, without the knowledge or consent of the Company or its board of directors, is no reason why the Company should be bound to pay for Anderson's alleged services. Two wrongs never did make a right, and Tatham's participation only makes the matter worse, instead of improving it.

Comment is made on page 16 of the indifference of the board of directors with regard to their regular meetings, in that several months at a

time elapsed without a meeting of the board of directors. Though this be true, it has no relevancy in this case, for Anderson's services were not rendered, nor was he injured in any way on account of this alleged failure to hold regular meetings. Had he endeavored to ascertain from the board whether Nones had authority to engage his services, and by reason of its failure to meet and respond to his request, then the company might be held responsible for its neglect to meet and advise Anderson of the facts. But such is not claimed; therefore the meetings of the board of directors are entirely immaterial and of no consequence in this case.

When a company has a well established going business, running smoothly, there is little or no necessity for a meeting of its board of directors, as those in charge have full authority to handle all its usual and ordinary business.

There is nothing in the record in this cause which in the slightest degree indicates that there was any necessity for a meeting of the board of directors during the period complained of, nor is there any evidence that the failure to hold the meetings during this period in any way affected defendant in error. As a matter of fact, he never knew anything about the minutes of the Mining Company until its minute book was returned to the lower court as an exhibit attached to the depositions which were taken in New York.

On page 17 counsel states that the sum of \$9176 was charged in one year to the New York office in a lump sum. This is true, and because the stockholders believed in its officers and accepted their reports as rendered and did not discover the deception of Nones and Tatham, is the Company to be bound in all other matters and things which they have engaged in without right or authority?

The weakness of this argument is that as soon as the stockholders learned of the items constituting the lump sums charged to the New York office, and as soon as they had investigated and learned of this proposed railroad and the power enterprise, they called a special meeting of stockholders. After all manner of delays, etc. (without fault of the stockholders), a meeting was finally held on February 15, 1913, at which the stockholders authorized an examination of its books by certified accountants, and an examination of its mining properties by a competent mining engineer,—the result of these reports being that at the annual meeting of stockholders in June, 1913, Nones and Tatham were deposed and a new board of directors installed and a new president and general manager elected.

If the court will take the time to read the stenographic copy of the minutes of the meeting of the stockholders of February 15, 1913, it will be convinced beyond question that the stockholders of the Mining Company did not acquiesce in these unauthorized dealings of its president after having gained knowledge of the facts.

Nones frankly testified that he held on to his job as president of the Company for several months, and that he was under fire and that his acts were questioned.

The strangest part of the argument under this heading, to our mind, is that all the facts discussed were events and circumstances happening *after* Anderson had entered upon and had in fact completed a great part of the services for which he has recovered judgment. How can he be permitted to rely upon *subsequent* acts as justifying his reliance or belief that Nones had authority to engage his services in these enterprises for and in behalf of the Mining Company?

The fallacy is obvious. What he must prove is acts or conduct relating to *past* transactions on which he relied or which would justify his assumption that Nones possessed the requisite authority to engage his services on behalf of the Mining Company. To justify express or implied authority, the evidence must relate to *past or prior or even contemporaneous* transactions.

If an agent's authority is to be justified by evidence of subsequent transactions, that evidence must be of a ratification, and not of independent acts or proceedings from which *authority* might or might not be inferred.

THE POWER COMPANY.

(pp. 17-23.)

Counsel says that this power project "was determined by the president to be a necessity". The fallacy of this argument lies in the fact that the president of a corporation has no power to determine whether such an enterprise is or is not a necessity. This determination belongs to and rests solely with the corporation itself.

Anderson testified that the deed executed by the Quicksilver Mining Company to the Senonac Power Company was for *rights of way for power and not for the Company's water rights* (Tr. p. 62).

On page 19 reference is made to the California Power Company and the resolution of the board of directors of September 20, 1911, concerning the transfer to this company of its water rights, etc.

There is no evidence that Anderson knew anything about this Company, or that he relied upon it in any particular, and even had he known anything about it, such fact would not justify him in believing that Nones possessed authority to buy additional lands and to organize another and different company.

On March 18, 1912, a resolution was passed by the board of directors of the Mining Company authorizing the transfer of its water rights to the Senonac Power Company. What has this to do with Anderson or his employment relating to other lands or other water rights? This resolution was

passed after his services in the power enterprise had been completed and there is not a scintilla of evidence in the record, directly or indirectly, from which it can be inferred that either the Mining Company or its board of directors had any knowledge that Anderson was employed in any capacity in relation to this matter, or that the Senonac Power Company or its promoters had obtained any options, or that they had made any investigations of other lands or of other water rights.

On page 22 it is stated:

“When plaintiff in error took over the stock of the Senonac Power Company it received the benefits of all of the services and expenditures of Mr. Anderson.”

There is no evidence that the Senonac Power Company ever took over anything which resulted from the services performed by Anderson. As a matter of fact Anderson himself testified that the options which he secured and which constituted the major portion of his services lapsed because Nones did not put up the moneys to complete the purchase price. There is no pretense of evidence in this case that any service or expenditure by Anderson benefited the Mining Company. On the contrary, it distinctly appears, and the fact is, that it was a detriment to the Company and an absolute squandering of its corporate funds. There is no evidence that the Mining Company accepted any benefit from these alleged services and expenditures with knowledge of the facts and circumstances.

Just as soon as the Mining Company had an opportunity to investigate the Senonac Power Company and the San Jose and New Almaden Railroad and as soon as it received full information of all of the facts, it immediately caused both corporations to be disincorporated. What else could it do—burial was the only thing.

THE RAILROAD COMPANY.

(pp. 23-40.)

The principal argument in support of Nones' alleged authority to engage in this enterprise are the statements of Nones, to wit:

“That the Quicksilver Mining Company needed better transportation, that he contemplated building an electric line, that there would be no stock sold, and that the Quicksilver Mining Company would pay for the building of the road and would take all the stock and that Nones depended entirely upon Anderson to produce the rights of way and franchises, etc.”

Legally, these are but the declarations of an alleged agent made without proof of authority, knowledge or consent of his principal. They have no value whatever as evidence and are not competent to prove Nones' authority to engage in the railroad enterprise.

On page 25 counsel says that it was known to the entire community that the railroad project was the project of the Quicksilver Mining Company,

as it had been announced to the community at the first meeting of citizens. This may be so, yet the knowledge which the community had was gained solely through the unauthorized declarations of the alleged agent. Nothing that was said or done by the Mining Company justified this belief in that community. If Anderson and the citizens along the line of the proposed railroad were content to accept Nones' statements as to his authority to engage in this enterprise without investigation or inquiry of any kind, they cannot now be heard to complain when it is known that he was acting without authority and entirely on his own initiative.

On page 26 counsel says that the proposed branch line to the "Senator shaft" was beneficial to none except the Mining Company. This statement is merely a supposition, as there is no evidence in the record that this proposed branch line would in the slightest degree benefit the Mining Company.

Outside of the record and as a matter of fact, no one but an insane man would build such a line. At the present time this Company is handling some four hundred or five hundred tons a day from the "Senator Shaft". Reduction works have been erected and the quicksilver is produced right at the shaft. Ordinary common sense teaches the wisdom of this method, and it does not take a mining engineer to demonstrate the absurdity of hauling four or five hundred tons per day to another furnace several miles away. It is a matter of common knowledge that the extraction from the

ores produced at this mine average one per cent or two per cent of quicksilver. Is it not easier and cheaper to haul one per cent or two per cent in weight than it is to haul one hundred per cent in weight, at least ninety-eight per cent of which is waste? The statement, therefore, that this alleged railroad would be beneficial to the Quicksilver Mining Company is an absurdity on its face.

Throughout the brief learned counsel has repeatedly referred to Mr. D. M. Burnett, and on page 26 attention is directed to the fact that he appears with the writer of this brief as one of the attorneys for the Mining Company in the present litigation.

Mr. Burnett is not and never has been the attorney for the Quicksilver Mining Company since the change of administration in 1913. Mr. Burnett is a gentleman of the highest type, a man whose integrity is unquestioned, and for many years has been and still is an intimate personal friend of the present counsel for the Mining Company. This litigation was first commenced in the Superior Court of the State of California in and for the County of Santa Clara. Counsel for the Mining Company had and still maintains his office in the City of San Francisco. Papers on removal from the state court to the federal court were prepared in San Francisco and sent to Mr. Burnett in San Jose to serve and file, with the request that he appear and present the motion, which was purely formal. This Mr. Burnett did, as a matter of friendship and as a courtesy to counsel, without

compensation. If Mr. Burnett's name and that of his partner appear as attorneys in this matter on the motion, it was an inadvertence and merely as a matter of compliment to Mr. Burnett. Mr. Burnett has taken no part in the trial of this case, and is not now the attorney for the Quick-silver Mining Company.

While all this is quite outside of the record and of no moment to this litigation, we deem this statement necessary that someone in reading the briefs might misconstrue the language used in connecting Mr. Burnett with the present litigation.

On page 27 it is stated that various sums of money were expended from time to time by the Mining Company for preliminary costs and expenses. It is quite true that Nones and Tatham disbursed the corporate funds of the Mining Company for alleged railroad purposes, but such expenditures were not known to the Mining Company or to its board of directors. No report of such expenditures was ever made to the board of directors by Nones and Tatham until the month of May, 1912, when Nones reported that \$3000 had been expended upon a right of way, surveys and cutting down grades. There was nothing else for the board of directors to do but to approve this expenditure. This, however, was done after Anderson's services had been completed, and in approving the expenditures no reference or report was made to any services performed by Anderson. As a matter of fact, the

action of the board in approving the expenditure of this money was not known to Anderson until after this suit was begun.

On page 27 reference is made to the fact that money was sent from New York to Mr. Anderson. This money was sent by Nones and there is no proof in the record that it was sent by the Mining Company or by or with the authority of its board of directors, and there is no proof that the Mining Company or its board of directors had any knowledge of such fact.

On page 29 counsel states that the entries which Tatham made on the books of the Mining Company at New Almaden must have accompanied and been a part of the annual reports which were printed and forwarded to the individual stockholders in New York City. Such a statement is not true and is not substantiated by any evidence in the record. On the contrary it distinctly appears that Tatham's Company annual reports made no mention of any sums expended by the Mining Company for either the railroad or the water project, all such were included under the general heading of "Bills Receivable".

If the court will kindly read the minutes of the stockholders' meeting of February 15, 1913 (Tr. pp. 224-30), the method of Nones and Tatham in keeping the Company's accounts and the deception employed by them in rendering same to the board and to the stockholders will be seen.

On page 30 of the brief reference is made to the payment of various sums by Tatham as treasurer of the Mining Company, aggregating a considerable sum. If the court will note the times of the respective payments and will compare same with the resolution of May 1, 1912, approving the president's action in ordering the sum of approximately \$3000 to be charged to *March Expenses*, it will be seen that Nones practiced a willful deception upon the board of directors. No such sum was ever charged to March expenses. The money had already been disbursed.

As stated in our opening brief, the fact that the board of directors on May 1, 1912, approved the unauthorized expenditures made by its president for this railroad project has no relevancy to this inquiry, as it was made after *Anderson's* services had been completed. Furthermore, he had no knowledge of such a resolution until after the commencement of this action. Consequently, this incident has no relevancy in this case.

The only time that the railroad enterprise was placed squarely before the board of directors was when Nones read a written report at the meeting of September 20, 1911. After hearing this report, which concluded as follows:

"This proposition is worthy of most serious consideration. I have devoted several months to it and have obtained the approval of the majority of the property owners whose lands are along the proposed line of the railway",

the board of directors of the Mining Company adopted a resolution that *before taking action* on an electric railroad that the president furnish complete specifications showing costs, earnings, etc., and authorized Director O'Brien to engage an engineer to make such a report.

Considerable stress and reliance is laid upon Nones' report of December 31, 1911, in which it is stated that the Company had obtained the necessary rights of way and franchises for an electric line to be owned entirely by the Company. This statement, taken in connection with the president's report to the board of directors of September 20, 1911, and the action of the board in reference thereto, can only mean that the president had obtained the approval of the majority of the property owners whose lands lay along the line of the proposed railroad. Inasmuch as at this time the board of directors were awaiting the report of the engineer as to feasibility, costs, etc., before taking action, such a statement in Nones' report to the Company is not such as necessarily advised the Mining Company that its president had expended its funds, or that he had employed Anderson to obtain rights of way, or that he had employed Anderson to organize the San Jose and New Almaden Railroad Company.

The Mining Company upon Nones' recommendation authorized an expenditure of \$8000 for a paint mill. The fact is that such a mill was never built and never will be built. The only evidence

the Company had as to the feasibility or advisability of such an enterprise was the statements of Nones. Subsequent investigation of this matter put this alleged enterprise in the same class with the railroad and power projects—rank nonsense and bunk.

On page 38 counsel again asserts:

“That an examination of his deposition (Nones) shows a very pronounced effort on his part to avoid the truth, thereby favoring the Quicksilver Mining Company.”

This statement is not backed by any particular quotation from the evidence or by any reference justifying such a conclusion.

Considerable stress is laid upon the fact that in Nones' schedules in bankruptcy he included defendant in error as his creditor for the sum of \$4500, under the heading: “guaranty of payment for work done for Quicksilver Mining Company”.

There is no inconsistency between this and the testimony of Nones, either on direct or cross-examination. Apparently Nones believed in these enterprises; he believed that the Mining Company would ratify and approve his acts when he placed them before the board; there is no question but that he believed that the board of directors would sanction and authorize the payment of \$4500 which he had promised to pay to Anderson, else why should he obligate himself personally by an instrument in writing to pay Anderson the sum of \$4500?

If we have not already said it, we take this occasion to say to this court that the bankruptcy pro-

ceedings introduced into this case show the why and wherefore of the present suit against the Mining Company. Does anyone imagine that if Nones was financially responsible and able to respond to Anderson for the sum of \$4500 that any action would ever have been commenced against the Mining Company? It was only when Anderson learned that Nones was a bankrupt and his obligation discharged that he was compelled to turn to the Mining Company in order to be compensated for the services which he rendered Nones.

We have quoted Nones' testimony on pages 28 to 33 of our opening brief relating to this matter, and we invite the court's particular attention to this and all of his testimony for the particular purpose of ascertaining whether it shows any effort, however slight, on his part to avoid the truth.

On page 40 counsel quotes:

“Q. You guaranteed him that \$4500 for his services for the Quicksilver Mining Company?
A. I did.”

From this, counsel deduces that Nones was permitted by the directors and stockholders to exercise unlimited powers. This testimony of Nones is nothing more or less than a declaration or admission on his part that the alleged services were rendered for and in behalf of the Mining Company. It proves nothing, as a principal cannot be bound by the declarations or admissions of its agent.

On the same page counsel says that the conduct of the board of directors and the stockholders as

to each of the proposed enterprises would and did warrant the same conclusion. But what conduct of the board and what conduct of the stockholders warranted such conclusion?

We concede and we repeat that Nones and Tatham had unlimited and paramount authority and power to conduct the ordinary and usual business of the Mining Company in California. They had unlimited power to operate its mining property, buy machinery, make improvements, employ and discharge men, buy supplies, and in short do anything and everything necessary in the operation of its mining property. They had the same authority as the president and general manager preceding them and the same authority that the present president and general manager now have, but the fact that this authority to operate and conduct its ordinary and usual business of mining was and is unlimited, does not mean and cannot be held to mean that Nones and Tatham had authority to engage the Mining Company in *other enterprises* outside of and directly and fundamentally different from its usual and ordinary business, and particularly in enterprises which the Mining Company had no authority to engage under its charter.

We submit that there was no implied authority conferred on Nones by the Mining Company, or by its board of directors, to employ Anderson for any purpose in either enterprise; that there was no acquiescence after knowledge of such employ-

ment; no holding out or negligence on the part of the Company in any respect as to any matter or thing done by Nones, of any authority assumed by him prior to or contemporaneous with the employment of Anderson, such as would warrant Anderson in believing that Nones possessed the requisite authority to employ him for and in behalf of the Mining Company. Nones very frankly testified that these enterprises were conceived by him and he personally employed Anderson and that Anderson understood that his employment was personal and not corporate,—that he fully expected that when he placed the matters before the board of directors that they would ratify his acts. These facts having been proved by defendant in error, we cannot see how a judgment in his favor can be sustained.

RATIFICATION.

(pp. 41-55)

On page 41 attention is directed to two resolutions of stockholders. The resolution of the annual meeting of 1911 is ineffectual for the reason that a quorum was not present,—41,619 shares only being represented against 100,000 shares outstanding.

Both resolutions were *pro forma*, and were adopted as a matter of course, and *without full explanation to the stockholders*. Such resolutions are of no value and under no circumstances could they aid defendant in error.

The following authority is sufficient answer to this contention:

“A general resolution at a stockholders’ meeting approving all acts of the directors and officers, such acts not being specified, nor the minutes thereof read to the meeting, is not a ratification of the same. A vote of the stockholders ratifying all the acts of the directors does not ratify acts which are not fully explained to the stockholders.”

Cook on Corporations, 6th Ed., Vol. 3, p. 2388, Sec. 730.

“An ultra vires of fraudulent act cannot be ratified by the majority so as to bind the minority; neither can it be ratified by the board of directors.”

Cook on Corporations, p. 2412, Sec. 733.

The case of *Ballard v. Nye*, 138 Cal. 598, is cited and a quotation therefrom appears on page 42. We have no quarrel with the law of this case, nor do we question the correctness of the decision. Judge Lorigan, in deciding that case said:

*“The doctrine of ratification proceeds upon the theory that there was no previous authority, and that the relation of principal and agent did not in fact exist, but implies it from the acts and conduct of the parties, and when so implied, is equivalent to previous authority * * ** The character of proof from which ratification may be inferred * * * is most frequently established by * * * the conduct and acts of the party in whose behalf the unauthorized agency was assumed inconsistent with any reasonable intention on his part, other than that he intended approving and adopting it” (p. 597).

There is nothing in the record in the case at bar which in the slightest way indicates that the Mining

Company intended approving and adopting Nones' action in employing Anderson. There is no evidence of anything done or of any fact known by the Mining Company concerning Anderson's employment, which compelled it to investigate and ascertain the facts. It clearly appears from the record that the Mining Company never knew or heard of Anderson's claim until October, 1913.

In the Ballard case the doctrine of ratification was properly applied, because Mrs. Ballard was informed of sufficient facts concerning the *unauthorized* collection of the insurance money by Hayford to put her on inquiry. She was promptly advised by Mr. Nye that the Insurance Company was ready to pay the money, and she also knew that Hayford had collected the insurance money which was due her, yet she allowed the matter to rest and took no action for nearly three years. Though Hayford had no authority as her agent to collect the insurance money in the first instance, yet her conduct and actions were such after being advised of the facts as to preclude her denial of an implied ratification.

The cases of Sun Printing and Publishing Association v. Moore, 183 U. S. 642, and Oakes v. Water Co., 143 N. Y. 431, arose over matters which were in the line of the company's usual and ordinary business. In neither case did the president attempt anything outside of the Company's usual and regular business, and the language of the court must be construed with this in mind. These cases, therefore, are to be distinguished from the

case at bar, and the language used is to be understood and applied with the limitation which we have noted.

The case of *Crowley v. Genessee M. Co.*, 55 Cal. 273, was correctly decided. The contract in this case was in line of the Company's usual and ordinary business, to wit: a contract to deliver ore at the Company's mill, one-half of the gross returns to be paid to Crowley, the other half to the Mining Company. Crowley was paid for the first mill run, but the Company refused to pay him for the second, *the Company retaining all the money.*

The court properly held that the fact that Quinn was the president and managing agent of the Mining Company was sufficient evidence of his authority to act, as the contract was obviously within the usual and ordinary business of the Company. Crowley performed on his part, and the Company having received and retained all the money, the Supreme Court properly held that the Mining Company was estopped to deny his authority to make the contract. In this case two features stand out and distinguish it from the case at bar:

1st. The contract was for a matter in the line of the Company's usual and ordinary business;

2nd. It received and retained an actual benefit as a result of Crowley's work.

The cases of *Case Manufacturing Co. v. Soxman*, 138 U. S. 431, and *Henderson Bridge Co. v. McGrath*, 134 U. S. 260, are not in conflict with our

position, as we have repeatedly conceded that a president and general manager who has full charge of a company's business has authority to bind it in any and all matters in the line of its usual and ordinary business.

The president of a corporation is merely its agent.

The Civil Code of California, Sec. 2319, provides:

“An agent has authority to do everything necessary or proper and usual *in the ordinary course of business* for effecting the purpose of his agency.”

This section of the California Code was literally transplanted from the New York Civil Code. See Sec. 1237.

“When a contract is made by an agent of a corporation in its behalf and for a purpose authorized by its charter, and a corporation receives the benefit of the contract without an objection, it may be presumed to have authorized or ratified the contract of its agent.”

Pittsburgh v. Keokuk Bridge Co., 171 U. S. 371.

This case undoubtedly expresses the true rule applicable to the case at bar:

First: The contract must be for a purpose authorized by its charter;

Second: The corporation must receive the benefit of the contract;

Third: It must receive the benefit without objection.

If these conditions exist then the corporation ought to be bound by the contract of its agent. In the case at bar the purpose of the contract was not authorized by the charter of the Mining Company; the Company did not receive the benefit of the alleged contract without objection—on the contrary it objected strenuously and is still objecting.

In the case of *Martin v. Webb*, 110 U. S. 7, the language of the court refers to “*a settled course of business*”. If the Mining Company had a well established, settled course of business concerning electric railroads, power plants and water rights, and had permitted its president to engage in same without objection and without interference, then, undoubtedly, the Mining Company would be obligated to pay Anderson for his services. But in the case at bar there is no evidence of any such settled course of business. There is no evidence that the Mining Company had any knowledge of such business and there is no evidence that it ever received any benefit without objection from any source in relation to these unauthorized and hazardous ventures.

In the case of *Henderson v. Western Gas Machine Co.*, 8 Cal. App. 249, *the president was authorized by resolution* of the board of directors to sell certain of its treasury stock. He employed brokers to sell same, and agreed to pay commissions for so doing. In an action by the broker to recover his commissions the court held the company liable as there was proof that it was customary to employ brokers and

pay commissions in such matters. Clearly this case is to be distinguished from the case at bar, as the president was *expressly authorized* by resolution to sell the stock. Employing a broker and paying commissions is merely a necessary incident to the exercise of the express power granted.

The case is *Sperlazzo v. Oliphant*, 24 Cal. App. 84, deals with the powers of the president and general manager of a going concern in matters arising in the usual and ordinary course of business.

We stated in our opening brief (p. 51) that obtaining options on lands for the purpose of controlling the water rights of a particular canyon cannot by any stretch of the imagination be held to be the usual and ordinary business of a mining company, and, on page 62: The purposes of the proposed railroad, to wit: to engage in and conduct a business of carriers for compensation, is so foreign to any purpose authorized by the charter of the Mining Company * * * that * * *

These statements have not been challenged by defendant in error.

We approve of the case of *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237, cited on page 49. The court will note that this case qualifies its statement of the law in the first sentence, when it says:

“When, in the usual course of business of a corporation, an officer has been allowed
* * * ”

We approve of the doctrine announced in the case of *Hackett v. Ottawa*, 99 U. S. 86, and *Chicago Co. v. Howard*, 7 Wall. 392. Corporations as much as individuals are and should be bound to good faith and fair dealing. No more than individuals should they be the victims of fraud or of unfair dealing.

We cited the case of *Gribble v. Columbus Brewing Co.*, 100 Cal. 71, in our opening brief. It expresses the true rule applicable to the case at bar, to wit:

“When with full knowledge of all the facts involved a principal reaps the fruits of the unauthorized contract of his agent and for some time yields acquiescence to its provisions, he will be deemed to have ratified it, and will be estopped as against one who has fully performed the contract on his part from repudiating it to the injury of the latter.”

Three things are necessary: (1) Full knowledge; (2) reaps the fruits of the unauthorized contract; (3) for some time yields acquiescence.

Is there any evidence in the case at bar that the Mining Company reaped the fruits of Anderson's service with full knowledge of the facts? Is there any evidence that *for some time* it yielded acquiescence to his unauthorized employment after knowledge of the facts?

There is no evidence in this case that the Mining Company had full or any knowledge of Anderson's employment until long after his services had been

completed. It never reaped any benefits from his services. On the contrary, it suffered considerable loss by the unauthorized expenditure of its funds in these enterprises. It never at any time yielded acquiescence to Anderson's employment, nor did it ever retain any benefit or advantage therefrom. On the contrary, it is proven that no benefits of any kind resulted from either of these schemes, or from Anderson's services in relation thereto.

The case of *Newhall v. Joseph Levy Bag Co.*, 19 Cal. App. 25, is not applicable. The disputed transaction related to the only business the corporation was engaged in—the buying and selling of bags. Under these conditions the corporation was held estopped to deny the authority of its agent to enter into the contract.

The case of *Goodwin v. Central Broadway Building Company*, 21 Cal. App. 377, is not in point. The president employed an attorney to defend a suit in which land owned by the corporation was involved. It accepted and retained the benefit of the attorney's services, and the court very properly held that the corporation was estopped to deny the authority of its president to employ the attorney.

The language quoted on page 50 from the case of *Bank of Columbia v. Patterson*, 7 Cranch 299, to wit:

“Wherever a corporation is acting within the scope of the legitimate purposes of the institution, all parole contracts made by its authorized agents are express promises of the corporation”,

is but another way of expressing the rule in this state, that the agent has authority to do everything necessary or proper or usual in the ordinary course of business for effecting the purpose of his agency.

We perceive no application of the cases cited on page 51, as the principles announced are not questioned and are not relevant.

We direct the court's attention to the language used by Mr. Chief Justice Redfield, quoted on page 52:

“It is notorious that the transaction of the *ordinary business* of railways, banks and similar corporations in this country, is without any formal meeting or votes of the board.”

In the case of *Scott v. Oil Co.*, 144 Cal. 140, the employment of the defendant by the president of the Company was *known to a majority* of the board of directors. The board held meetings in the vicinity and did not repudiate the employment, and the court properly held that the separate consent of a majority of the board was all that ought to be required under the circumstances.

In the case at bar only two out of eleven directors knew of Anderson's employment. If a majority of the directors had known of his employment and had not repudiated it within a reasonable time, so as not to cause him any unnecessary injury, does this court believe that a corporation which has created and disbursed more than \$150,000,000 would now be taking up the time of this court in the defense of this action?

At the bottom of page 53 counsel contends that the Mining Company had knowledge of the employment of Anderson because its president had such knowledge, and that whatever was known to the president was necessarily known to the corporation, because it has no eyes, ears or understanding, and that as the president is the head of the corporation it was and is his duty to report all matters coming to his attention to the board of directors. Undoubtedly such a rule would be applicable and the Company bound in all matters coming to the attention of the president relating to its usual and ordinary business. It is not a fixed and arbitrary rule, however. If it was, then every corporation would be bound by every crooked act by a worthless president, just because this worthless president has notice or knowledge of his illegal acts. Such a rule would make conspiracy a profitable business.

The evidence in the case at bar shows conclusively that no report was made by Nones to the corporation concerning Anderson's employment or of the alleged liability of the Mining Company to him. On the contrary, Nones expressly denies any liability on the part of the Mining Company and asserts that he was personally responsible to Anderson in these matters. The law never permits itself to be twisted so as to effect an absurd or iniquitous rule. The law is never permitted to injure the innocent, nor will it ever be permitted to be used as the means of protecting a fraudulent act.

The rule declared in *Balfour v. Fresno Canal Co.*, 123 Cal. 397, has its limitations, and it is so manifestly inapplicable to the case at bar that we leave it without further comment.

The case of *Blood v. La Serena Land & Water Co.*, 134 Cal. 370, is a case showing the proper application of the rule of knowledge by the officers of a corporation. In this case the doctrine of estoppel was applied, and under the facts developed, it was properly held that the corporation was bound by the knowledge of its president and secretary.

Knowledge by the officers of a corporation which is imputed to the corporation itself, is knowledge of legitimate matters in the company's ordinary and usual business. There may be circumstances in connection with the transaction whereby the corporation will be estopped from denying the knowledge of its president and secretary.

While such rules are just and proper, no authority can be found in the books arbitrarily establishing a rule of law to the effect that the knowledge of a president or other officer of a corporation under all circumstances is the knowledge of the corporation.

As we have said, such a rule would permit a scheming and designing president to participate in unlawful profits and bankrupt his corporation.

The true rule is:

“The corporation has notice of facts which came to the knowledge of its officers or agents while engaged in the business of the corporation,

provided those facts pertain to that branch of the corporate business over which the particular officer or agent had some control.”

Cook, Sec. 727, p. 2366;

Zeigler v. Valley Coal Co., 113 N. W. 775
(Mich., 1907).

RATIFICATION.

(pp. 55-58)

The sections of the California Code, cited on page 56, expressly require that the ratification or acceptance be “*with notice thereof*”.

The case of *Bien v. Bear River Co.*, 20 Cal. 613, dealt with a case of ratification of a contract entered into by its president.

On page 614 the court said:

“The circumstances indicate a different state of facts for it is unreasonable to suppose that the board with Neall at its head confirmed the contract in ignorance of its terms. It can not be said that the contract was not included in the ratification for the ‘proceedings’ were ratified as well as the report, and the ‘proceedings’ embraced the contract. It amounted to an express ratification of the contract.”

We particularly direct the court’s attention to the language of the court found at the top of page 613, to wit:

“On the question of authority, the plaintiff relies upon the general powers of Neall as president, and upon a ratification by the Board of Trustees, and various acts showing an acceptance of the contract. It is clear that Neall had

no such authority merely as president, *for his powers in that capacity only extended to matters arising in the ordinary course of the business of the corporation.* Outside of these matters he had no power to bind the corporate body and he was not authorized to make contracts for the purchase of the property, unless required in the usual course of business."

This statement of the law is so clear and concise that nothing that we can say can add to its force. Its application to the case at bar is obvious. It supports our contention.

At the bottom of page 57 counsel repeats that "the essential point is that * * * board * * * in ratifying the acts of the president, possessed full knowledge of what it was doing".

If the court will turn to the minutes of the meeting of the board of directors of the Mining Company of May 1, 1912, quoted in our opening brief on page 19, and carefully read same, it can come to but one conclusion, to wit: that its action at this time related solely to the past actions of its president, to wit: approving the expenditure of \$3000 and charging it to March expenses. It is quite clear from the resolution adopted that the action of the board referred and related to expenditures which had been actually made.

From the Company's books it is quite evident that Nones had not accurately presented the matter to the board and that the board was not fully advised of the truth relating to this matter. *\$3000 was not* and had not been charged to March ex-

penses, hence it can not be held that the Mining Company is bound by the ill-advised and wrongful action of its board of directors in approving or attempting to approve unauthorized and illegal expenditure of corporate funds; especially should this be so, when it appears that the information upon which the board acted was not accurate and entirely true in all respects.

ULTRA VIRES.

(pp. 58-64)

Defendant in error quotes the opinion of the learned judge of the District Court as an answer to our contention that the enterprises undertaken by Nones were and are ultra vires.

A careful reading of this opinion, relating to this subject, reveals the fallacy of the reasoning which, we respectfully submit, led the learned Justice into error. We direct this court to the language of the opinion, to wit:

“deliberately entered into by defendant *through its authorized agent*, has been fully performed * * *. It would now be in the highest degree unjust to permit defendant to reap the benefit of whatever advantages may have accrued from the performance of the contract”.

If it be conceded that Nones was the “authorized agent” of the Mining Company, then the first premise would undoubtedly be justified. The objection, however, is that though Nones solemnly

and deliberately entered into the contract with Anderson *he was not the "authorized agent" of the Mining Company for such purpose.*

Secondly, it is not enough that the Mining Company reaped benefits of whatever advantages which "*may have accrued*". Before a corporation can be held liable for acceptance of the benefits, it is incumbent upon the person sustaining the burden of proof to show that *it did* reap the benefits of the advantages which did accrue. *It is not enough that it may have done so.* It must satisfactorily appear that it actually did so; in other words an actual benefit must be proved.

In dealing with this subject the learned Justice further said:

"I do not feel, however, that the doctrine of ultra vires is necessarily involved."

In supporting this conclusion he reasoned as follows:

"But plaintiff was employed and he rendered his services not in the organization or the conduct or control of such new corporations and new business, but in the taking of certain preliminary steps," etc.

The vice in this reasoning lies in the fact that *it is contrary to the claims of the defendant in error, set out in his complaint* (Tr. pp. 1 and 2).

Parties are bound by the allegations of their pleadings and are not permitted to controvert their sworn allegations or to adopt a different theory

than the case made by the pleadings. Citation of authority is not necessary to support so elementary a proposition.

For these reasons we most respectfully submit that the opinion of the learned Justice is unsound and is no answer to the argument found in our opening brief (pp. 59-63).

At the bottom of page 59 counsel asks that whether under the Mining Company's charter it could not improve, perfect and market this valuable asset (water). Certainly not. There is nothing in its charter authorizing it to engage in the business of selling water, or for conserving or using its water for the purpose of generating electric power. As we stated in our opening brief, when the charter of the Mining Company was granted, electric power was not known and it was not contemplated that the water powers, which this company then owned, and still owns, could or would be utilized for the purpose of generating electricity to be used for power purposes.

The answer to this question is so clearly stated by Mr. Justice Gray in 131 U. S. 371, that we repeat:

"The reasons why a corporation is not liable upon a contract ultra vires * * * are * * * *The interests of the stockholders that the capital shall not be subjected to the risk of enterprises not contemplated by the charter and therefore not authorized by the stockholders in subscribing for the stock.*"

If the water rights owned by the Mining Company in the course of time should become valuable

as a water power for the generation of electricity and the corporation desired to take advantage and reap the benefits from its value it would be a simple matter for the stockholders of the Mining Company to so amend its charter as to include the necessary powers so to do. All the stockholders would then be advised of the extent of the powers conferred by its charter and could rest content until fully advised to the contrary that its business operations were confined and limited to the purposes or powers contained in its charter.

The same reasoning applies to the construction of a modern electric road. There is no reason for stretching or distorting the provisions of the Mining Company's charter by judicial construction so as to include this unknown and unheard of purpose when the charter was granted.

The language of the constitution of the State of California, applicable to this situation, is so simple and so clearly expressed that there can be no possible doubt as to its meaning.

“No corporation shall engage in any business other than that expressly authorized in its charter or the law under which it may have been or may hereafter be organized.”

Article 12, § 15 of the Constitution of California is as follows:

“No corporation organized outside the limits of this state shall be allowed to transact business within this state on more favorable conditions than are prescribed by law to similar

corporations organized under the laws of this state."

Inasmuch as the Constiution is the supreme law of the state, its provisions govern and control this question.

Unless, therefore, the charter of the Mining Company *expressly* authorizes it to engage in the water and railroad enterprises, they are *ultra vires*.

If the Mining Company desires to keep abreast with civilization and to take advantage of modern science, it can easily do so by amending its charter.

On page 60 counsel states that the great fault of our argument is due to the fact that we can not realize that the enterprises undertaken were a part of the business of the Mining Company.

It is utterly inconceivable to us how a power company organized for the purpose of taking over and developing water power and utilizing same for the purpose of generating electricity and selling same for power purposes, or the construction of a modern electric railroad for the carrying of freight, mail and passengers, can be included as a part of the business of an ordinary mining company, *especially one with so narrow and limited a charter as was granted to the Mining Company.*

We offer no apology for not agreeing with the alleged views of the three other lawyers, referred to by counsel, for the reason that it does not appear from the evidence that they were ever called upon to consider this question or that their opinion

was ever requested on it. Even if these gentlemen were of the opinion of the writer on this subject, that fact would not necessarily prevent them in taking the position which counsel alleges they did. If a corporation duly and regularly determines to engage in a business which is concededly *ultra vires*, it does not lie with any individual to question the exercise of that power. The right to do so rested solely with the state.

The argument, however, concerning the opinion of the three other lawyers is based upon inference merely and not upon evidence and is therefore of no weight.

The case of *Bates v. Coronado Beach Co.*, 109 Cal. 160 is not in point for the reason that the court in that case expressly determined,

“under these circumstances it must be held that the contract was not only within the scope of its organization and essential to the transaction of its ordinary affairs but that it was a prudent step on the part of the appellant for preserving the value of the securities which it had taken upon its sale of the land”.

The case of *Vandall v. South San Francisco Dock Co.*, 40 Cal. 83, is not in point for the reason that no question was involved as to the corporation engaging or participating in any unauthorized business.

The Company merely obligated itself to pay the sum of \$20,000 for certain benefits conferred by the railroad company, which had a manifest

tendency to improve and enhance the value of its property. It will be noted that the question to be determined in this case related merely to the payment of the money for a purpose which the corporation deemed would be of benefit or advantage to it and that the corporation did not undertake to engage in the business of running or operating a railroad company.

The same is true as to the case of *Temple Railway v. Hellman*, 103 Cal. 634. The corporation in this case merely paid a sum of money for a right which would increase its business. It did not attempt to engage in the baseball business.

It is quite evident that no satisfactory answer has been made to our contention of *ultra vires*. This being so, the judgment must necessarily be reversed and entered in favor of the Mining Company.

ESTOPPEL TO PLEAD THE DEFENSE OF ULTRA VIRES.

(pp. 64-78.)

This doctrine is relied upon by defendant in error and has been quite elaborately presented.

It presupposes that the action taken by the corporation was and is *ultra vires* but that on account of certain conditions resulting, the corporation is estopped to take advantage of benefits which it accepted or received and then escape its liability or responsibility.

It is expressed by the courts of this State as follows:

“A corporation having *knowingly received and retained the benefit of contracts* entered into by its directors and officers, even though the contracts were without the specific authority of the defendant, will not be heard to repudiate those contracts, or be permitted to escape the obligations thereof.”

Blanck v. Commonwealth Amusement Corporation, 19 Cal. App. Dec. 720.

We concede that estoppels *in pais* operate against corporations the same as against individuals.

If an officer of a corporation, or other person, assuming to have power to bind the corporation by a given contract, enters into the contract for the corporation and the *corporation receives the fruits of the contract and retains them after acquiring knowledge of the circumstances attending the making of the contract*, it will thereby become estopped from afterward rescinding or undoing the contract.

A corporation is in like manner estopped *by retaining with knowledge the fruits of the contract* from pleading *ultra vires* as a defense to an action thereon, that is, from setting up a defense to an action to compel the performance of the contract on its part that it was without power to enter into it.

10 Cyc., 1067-1068.

A Federal decision clearly expresses the reason for the exception:

“Corporations may be liable to the payment of money on account of contracts which they have entered into *ultra vires* of their character, and which have been performed by the other party to the contract. The right to relief in such cases rests upon the fact that the defendant corporation has obtained an advantage which it can not justly retain.”

94 Fed. 925.

We have no quarrel with the authorities cited by defendant in error. But we do insist that they are not applicable to this case.

The fallacy of this argument lies in the *unwarranted assumption* of essential facts not established by evidence. We have heretofore directed the court's attention to the failure of proof in these particulars.

Defendant in error asserts that the Mining Company should not now be heard to urge the defense of *ultra vires* for the reason that it has received and retains the benefits of his services. The Mining Company received no benefits, and it does not and did not enjoy the fruits of Anderson's services. The railroad was never authorized and never built. When the new Board of Directors took office both the railroad company and the power company were immediately disincorporated. No benefits of any kind flowed to the Mining Company; on the contrary, it sustained actual loss,—an actual waste of corporate funds.

Anderson's services were wholly worthless and the Mining Company did not receive any benefit therefrom in any shape, manner or form.

The Supreme Court of this State has held that a corporation is not estopped to deny the validity of an unauthorized act of an agent when it has not availed itself of any benefit from his act.

Bliss v. Kaweah Co., 65 Cal. 502;

Thomasson v. Church, 113 Cal. 558.

In the first case cited by defendant in error under this heading,—Argenti v. City of San Francisco, 16 Cal. 255,—the Supreme Court of this State said:

“ * * * the party who has had the benefit of the contract can not be permitted in an action founded upon it, to question its validity.”

The court will note that the party who is estopped to question the validity of the contract is the party who has had the benefit, not a party who may have had the benefit, but the party who actually has had the benefit; therefore the burden was on defendant in error in this case to prove by a preponderance of the evidence to the satisfaction of the court that the Mining Company actually had and received the alleged benefits claimed by defendant in error. It is not enough that defendant in error proved that the Mining Company received something; it must prove that it did, in fact, receive a benefit *non constat*. The thing received might have been a liability. Fortunately for plaintiff in error it clearly appears in the case at bar that the alleged benefit thrust upon it was not, in fact, a benefit but, the contrary, was nothing more or less than an actual loss to the Mining Company.

Therefore, the evidence in this case is insufficient to support this doctrine as defendant in error has failed to prove that the Mining Company accepted and enjoyed any benefits as a result of his alleged services. It can not be contended that under such circumstances that the corporation is endeavoring to escape a just liability.

On page 73 the question is asked whether or not the taking over of all the stock was not a receipt of something of value. Two answers suggest themselves to this query.

1st. Whatever stock the Mining Company took over was paid for at its full value without any knowledge of any service performed by defendant in error.

2nd. There is no proof that this stock had any value, nor is there any proof that the stock of the Senonac Power Company had any value.

Not only is there no proof that it had any value, but there is proof in the record that it was utterly worthless and of no value and that the scheme itself was a fizzle and a failure.

The question in this case is not what the stock of the railroad company or the power company *ought* reasonably to be worth, or what its value *ought* to be. It was incumbent upon defendant in error to prove by a preponderance of the evidence that *it was of value* and that the Mining Company did acquire something of value when it took over this stock which we have proved to be worthless.

A great many things cost time and money to secure. The important question is, when secured are they of any value? The theory of estoppel, which counsel contends for, is predicated upon the fact that the corporation should not be permitted to retain something of value and reject a corresponding liability.

On page 74 we believe that counsel has inadvertently included Mr. Burnett as a party representing the Mining Company, upon whose representations Anderson relied. Mr. Burnett was not elected a director until June, 1912, after Anderson's services had been completed.

On the bottom of the same page Tatham's testimony is quoted to the effect that he usually paid bills from this end. Had counsel quoted all his testimony in this regard, it would have appeared from his testimony that he would not have allowed or paid Anderson's claim.

A proposed electric railroad and a large power company, alleged to be the creation of a wealthy mining corporation, naturally awakens public interest in the community and adds to the land values in the vicinity. They create demands and facilitate the sale of the surrounding lands. It is in evidence that during the Nones' administration the Mining Company sold off considerable acreage. Anderson received a commission for these sales.

Both propositions were and are ridiculous, not in any way connected or related with the ordinary

and usual business of the Quicksilver Mining Company.

Therefore, judgment in favor of Anderson for the sum of \$7411.00 is against law and is not sustained by the evidence.

We respectfully submit that the judgment should be reversed with instructions to the court below to order judgment in favor of the Mining Company.

Dated, San Francisco,

June 20, 1917.

Respectfully submitted,

A. H. JARMAN,

Attorney for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

QUAN YOU, Otherwise Known as LOW JUNE,
Appellant,
vs.

EDWARD WHITE, as Commissioner of Immigra-
tion at the Port of San Francisco, California,
Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.

Filed

MAY 22 1917

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

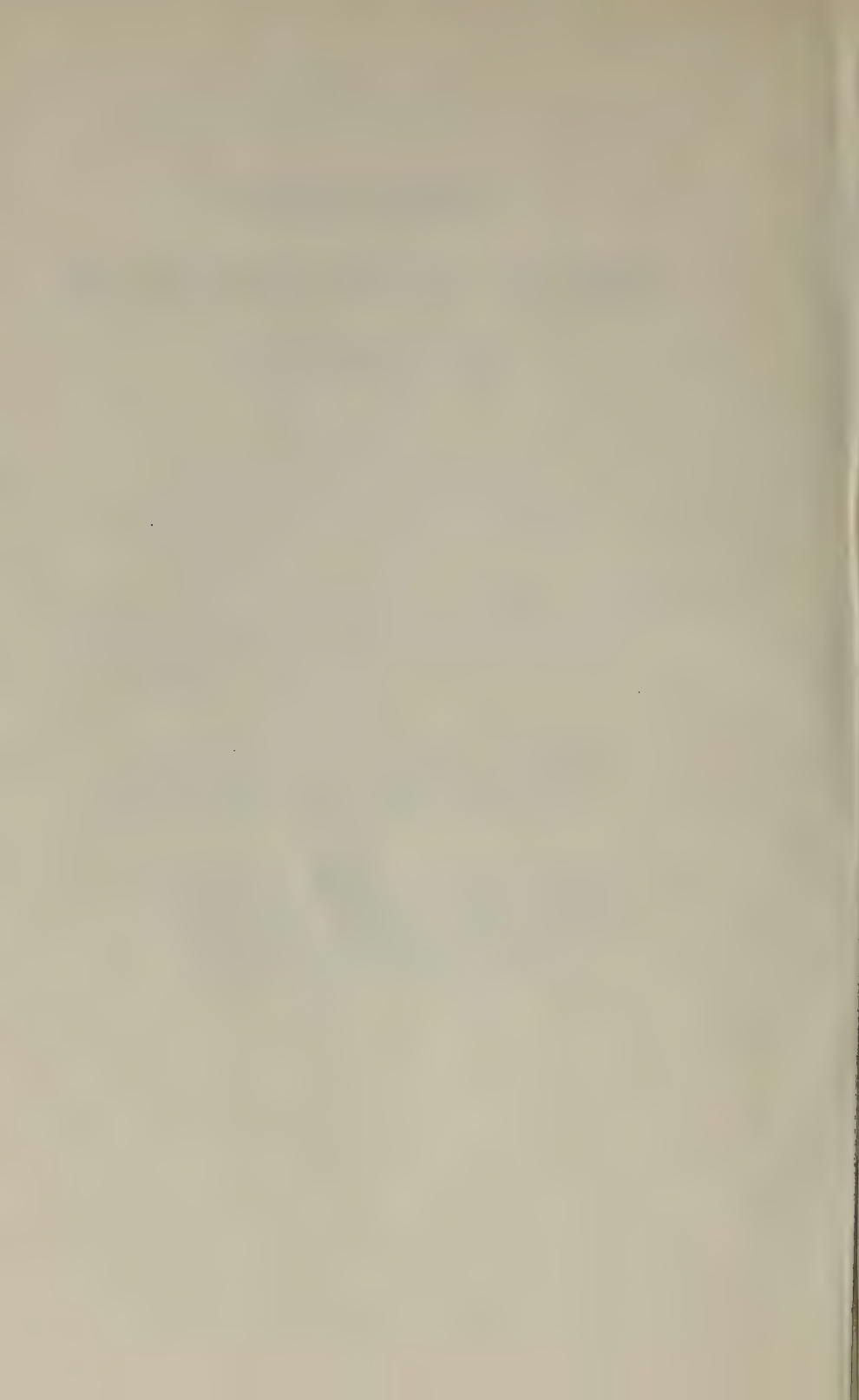
QUAN YOU, Otherwise Known as LOW JUNE,
Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigra-
tion at the Port of San Francisco, California,
Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the Southern Division of the District Court of
the United States, Northern District of Cali-
fornia, First Division.*

No. 16,105.

In the Matter of QUAN YOU, Otherwise Known
as LOW JUNE, on Habeas Corpus.

Names and Addresses of Attorneys.

For the Petitioner and Appellant: GEO. A. Mc-
GOWAN, Esq., San Francisco.

For the Respondent and Appellee: U. S. ATTOR-
NEY, San Francisco, Cal.

*District Court of the United States, in and for the
Northern District of California, Southern Divi-
sion, First Division.*

No. 16,105.

In the Matter of the Application of QUAN YOU
(Otherwise Known as LOW JUNE), on Ha-
beas Corpus.

(Praeceptum for Transcript on Appeal.)

To the Clerk of Said Court:

Sir: Please make up Transcript of Appeal in the
above-entitled case, to be composed of the following
papers, to wit:

1. Petition for Writ of Habeas Corpus.
2. Order to Show Cause.
3. Demurrer to Petition.
4. Minute Order Regarding Immigration Rec-
ord.

5. Judgment and Order Dismissing Order to Show Cause and Denying Petition for Writ.
6. Notice of Appeal.
7. Petition for Appeal.
8. Assignment of Errors.
9. Order Allowing Appeal and Releasing on Bond.
10. Citations on Appeal—Original and Copy.
11. Order Extending Time to Docket Case.
12. Stipulation and Order Regarding Immigration Record.
13. Appearance Bond.
14. Clerk's Certificate.

GEO. A. MCGOWAN,

Attorney for Petitioner. [1*]

Due service and receipt of a copy of the within Praeipe is hereby admitted this 15th day of January, 1917.

JNO. W. PRESTON,

U. S. Attorney, Northern District of California,
Attorney for Respondent.

[Endorsed]: Filed Jan. 15, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [2]

*In the District Court of the United States, in and
for the Northern District of California, South-
ern Division, First Division.*

No. 16,105.

In the Matter of QUAN YOU, Otherwise Known
as LOW JUNE, on Habeas Corpus.

*Page-number appearing at foot of page of original certified Transcript of Record.

Petition for Writ.

To the Honorable M. T. DOOLING, United States District Judge, in and for the Northern District of California, Now Presiding in the Above-entitled Court:

It is respectfully shown by the petition of Quan Hen:

That Quan You, otherwise known as Low June, hereinafter referred to as the detained, is unlawfully imprisoned, detained, confined and restrained of his liberty under the order of and by the direction of the Secretary of the Department of Labor by Edward White, Commissioner of Immigration for the Port of San Francisco at the Immigration Station at Angel Island, County of Marin, or at some other place within the State of Northern District of California, Southern Division thereof. That the said imprisonment, detention, confinement and restraint are illegal, and that the illegality thereof consists in this, to wit:

That it is claimed by the said Secretary and the said Commissioner that the detained is an alien Chinese person who has been found within the United States in violation of the provisions of a law of the United States, to wit, the Chinese Exclusion or Restriction Laws or Acts, and that he was therefore subject to be taken into custody and returned to the country whence he came under section 21 of the Immigration Act approved February 20, 1907. [3]

That the said Commissioner now holds the said detained in custody under a warrant of deportation

of the said Secretary of Labor, within the State and Northern District of California, Southern Division thereof, and it is the purpose and intention of the said Commissioner to execute the said warrant of deportation by causing the detained to be deported upon the SS. "China," sailing from the port of San Francisco, at 1:00 o'clock P. M. on October 10, 1916, and unless this Court intervene the said detained will be carried away from his domicile within the United States, and deprived of his rights, as in this petition hereinafter expressly set forth.

Your petitioner alleges that the detained does not come within the restrictions or provisions of said Immigration Act. But on the contrary your petitioner alleges at the finding of said Secretary of Labor that the detained violated the Chinese Exclusion and Restriction Acts by presenting what the Secretary claims to be fraudulent proof of his said exempt status, is in excess of the jurisdiction, powers and authority of the said Secretary, and particularly in violation of the Chinese Exclusion and Restriction Acts, which said acts provide that Chinese persons found unlawfully within the United States shall be arrested and accorded a trial before a United States Justice, Judge or Commissioner; and that the said Secretary of Labor is not one of the judicial officers enumerated in said acts as having authority to determine the question of the legality or illegality of the residence of a Chinese person charged with being illegally within the United States. Your petitioner further alleges that the action of the said Secretary of Labor in assuming jurisdiction over the

said detained and in issuing said warrant of deportation acted in violation of the provisions of Section 43 of the said General Immigration Laws hereinbefore more particularly described. [4]

Your petitioner further alleges upon his information and belief that the said detained is a Chinese person, lawfully domiciled within the United States of America. That the said detained person was engaged in business, as a merchant and member of the firm of Hing Kee & Co., which was a firm engaged in buying and selling merchandise, at a fixed place of business, at No. 427 Harrison Street, in the city of Oakland, county of Alameda, State of California, and that as such merchant the said detained sought a prior examination of his status as such Chinese merchant, and that in accordance and compliance therewith the Commissioner of Immigration for the port and district of San Francisco, received and examined the said application and approved the same, and upon the departure of the said detained from the United States out of the port of San Francisco the said Commissioner of Immigration issued to the detained a Merchants' Form 431, Approved Departing Merchant's Certificate; and that upon the conclusion of the visit of the said detained in China he returned to the port of San Francisco during the months of May, June or July, 1914, and made application to re-enter the United States as a resident Chinese merchant, lawfully domiciled therein, and that the Commissioner of Immigration for the port and district of San Francisco, and the immigration authorities under the said Commissioner did order

and permit the said detained to enter the United States, under the provisions of both the General Immigration Law, hereinbefore referred to, and the said Chinese Restriction or Exclusion Acts, hereinbefore generally referred to, and which are particularly described as the act of Congress of May 6th, 1882, as amended and added to by the act of July 5th, 1884, the act of September 13th, 1888, the act of November 3d, 1893, and the acts supplemental thereto and in amendment thereof.

Your petitioner further alleges upon his information and [5] belief that the said Secretary of Labor made a mistake in interpreting and construing the said Acts of Congress, hereinbefore referred to as the Chinese Restriction or Exclusion Acts, and has held that this detained could be deported because he has labored since his re-entry into the United States, notwithstanding the fact that it was established to the satisfaction of the Commissioner of Immigration for the port and district of San Francisco, that the said detained was a merchant, as defined in said Chinese Restriction or Exclusion Acts for a year prior to his departure for China, and in this connection your petitioner alleges upon his information and belief that the said detained was for a year prior to his departure for China a merchant as defined and described in said Chinese Restriction or Exclusion Acts, and that he submitted the class and kind of evidence as required in said acts to the Commissioner of Immigration for the port and district of San Francisco. That your petitioner therefore alleges that the action of the said Secretary of

Labor in ordering the detained deported because he had labored since he was admitted into the United States was and is in violation of law, and the warrant of deportation thereon is for said reason null and void.

That your petitioner further alleges upon his information and belief that the alleged hearing upon which the said warrant of deportation was issued by the Secretary of Labor was unfair in this, that there was not evidence in said record to sustain the conclusion and finding of the Secretary of Labor that the detained is a Chinese alien who had entered the United States in violation of the said Chinese Restriction or Exclusion Acts, and had practiced fraud upon the immigration authorities in procuring his re-entry into the United States as hereinbefore in this petition set forth, and the conclusion of the said Secretary that the said detained, [6] when he re-entered the United States as a returning Chinese merchant, did so fraudulently, is unsupported by the evidence and said conclusion or finding of the said Secretary rests upon conjecture and suspicion and not upon evidence, and that there was no substantial or other evidence to sustain the said order of deportation made by the said Secretary, and that for said reason the said order of deportation is arbitrary and unfair and subject to judicial review.

That your petitioner, Quan Hen is a friend of the said detained, and makes this petition upon his behalf, for the reason that the said detained is in the custody, as aforesaid, and is for said reason unable to verify the said petition personally, and,

therefore, your petitioner, as his next friend, verifies the said petition upon his behalf. That your affiant has not in his possession a copy of the immigration record or hearing used as a basis or foundation for the issuance of the said warrant of deportation herein against the said detained. That the said hearing took place in the State of Alabama, and that there is no copy of said record within the jurisdiction of this Court, and that it is impossible for your petitioner to obtain a copy thereof to file with this petition. That upon the information and belief of your petitioner the only copy of said hearing is in the office of the Secretary of Labor, in Washington, D. C., and in the office of the immigration authorities in the State of Alabama, or where said hearing was conducted, and that the said detained has just been brought within the jurisdiction of this Court for the purpose of being deported as hereinbefore set forth, and that sufficient time have not elapsed between the bringing of the said detained within the jurisdiction of this Court and the contemplated deportation to enable your petitioner to procure a copy of said immigration [7] record, and to delay the filing of the petitioner herein until a copy thereof could be obtained would render it impossible to present the petition to this Court in time to prevent the deportation herein sought to be prevented.

WHEREFORE YOUR PETITIONER PRAYS, that a Writ of Habeas Corpus issue herein, as prayed for, directed to the said Commissioner commanding him to have the body of the said detained,

together with the time and cause of his detention before your Honor at a time and place to be therein, in said order specified, to the end that the cause of the detention of the said detained may be enquired into, and that he may be discharged from custody.

QUAN HEN.

GEO. A. MCGOWAN,

Attorney for the Detained, 550 Montgomery
Street, San Francisco, California. [8]

UNITED STATES OF AMERICA,

State and Northern District of California,
City and County of San Francisco,—ss.

Quan Hen, being first duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that the same has been read and explained to him and he knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

QUAN HEN.

Subscribed and sworn to before me this 9th day
of October, 1916.

[Seal]

HARRY L. HORN,

Notary Public, in and for the City and County of
San Francisco, State of California.

(CHINESE PICTURE.)

Photograph of Petitioner.

[Endorsed]: Filed Oct. 9, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [9]

*In the District Court of the United States, in and
for the Northern District of California, South-
ern Division, First Division.*

No. 16,105.

In the Matter of the Application of QUAN YOU,
Otherwise Known as LOW JUNE, on Habeas
Corpus.

Order to Show Cause.

Good cause appearing therefor and upon reading the verified petition on file herein, it is hereby ordered that Edward White, Commissioner of Immigration for the Port and District of San Francisco, appear before this Court on the 14th day of October, 1916, at the hour of 10 o'clock A. M., of said day to show cause, if any he has, why a Writ of Habeas Corpus should not be issued herein as prayed for; and that a copy of this order be served upon said Commissioner, and a copy of said petition upon the United States Attorney.

AND IT IS FURTHER ORDERED that the said Edward White, Commissioner of Immigration, as aforesaid, or whoever, acting under the orders of said Commissioner, or of the Secretary of Labor, shall have the custody of the said Quan You, otherwise known as Low June, are hereby ordered and directed to retain the said person within the custody of the said Commissioner of Immigration and within the jurisdiction of this Court until its further order herein.

Dated San Francisco, California, October 9th,
1916.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Oct. 9, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [10]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the court-room thereof, in the City and County of San Francisco, on Saturday the 11th day of November, in the year of our Lord, one thousand nine hundred and sixteen: Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 16,105.

In the Matter of QUAN YOU, *alias* LOW JUNE,
on Habeas Corpus.

(Minutes of Hearing on Order to Show Cause.)

This matter came on regularly this day for hearing of the order to show cause as to the issuance of a writ of *habeas corpus* herein; and for hearing of the demurrer to said petition for writ of *habeas corpus*. Geo. A. McGowan, Esq., was present as attorney for petitioner and detained. C. A. Ornbaun, Esq., Assistant United States Attorney, was present on behalf of respondent, and presented part of the immigration records, which the Court ordered filed and marked Respondent's Exhibit "B" and that the same be considered as a part of the original petition filed

herein. After hearing attorneys for the respective parties, the Court ordered that said matter be submitted on the records herein. [11]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,105.

In the Matter of the Application of QUAN YOU,
Otherwise Known as LOW JUNE, on Habeas
Corpus.

Demurrer to Petition for Writ of Habeas Corpus.

Now comes the respondent, Edward White, Commissioner of Immigration at the Port of San Francisco, in the State and Northern District of California, and demurs to the petition for a writ of *habeas corpus* in the above-entitled cause and for grounds of demurrer alleges

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of *habeas corpus*, or for any relief thereon;

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of *habeas corpus* be denied.

JNO. W. PRESTON,

United States Attorney.

CASPER A. ORNBAUN,

Asst. United States Attorney,

Attorneys for Respondent.

[Endorsed]: Filed Oct. 28, 1916. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [12]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,105.

In the Matter of QUAN YOU, on Habeas Corpus.

**(Order Sustaining Demurrer to and Denying
Petition for a Writ of Habeas Corpus.)**

GEORGE A. MCGOWAN, Esq., Attorney for
Petitioner.

JOHN W. PRESTON, Esq., United States Attorney and CASPER A. ORNBAUN, Esq., Assistant United States Attorney, Attorneys for Respondent.

The demurrer to the petition for a writ of habeas corpus herein is sustained, and the said petition is denied.

November 14th, 1916.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Nov. 14, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [13]

*District Court of the United States, in and for the
Northern District of California, Southern
Division, 1st Division.*

No. 16,105.

In the Matter of QUAN YOU (Otherwise Known
as LOW JUNE), on Habeas Corpus.

Notice of Appeal.

To the Clerk of the Above-entitled Court, and to the
Hon. JOHN W. PRESTON, United States At-
torney for the Northern District of California:

You and each of you will please take notice that
Quan You (otherwise known as Low June), the peti-
tioner and the detained above named, does hereby
appeal to the Circuit Court of Appeals of the United
States for the Ninth Circuit from the order made
and entered herein on the 14th day of November,
1916, sustaining the demurrer and denying the peti-
tion for a writ of *habeas corpus* filed herein.

Dated San Francisco, California, November 20th,
1916.

GEO. A. McGOWAN,
Attorney for Petitioner, Detained and Appellant
Herein. [14]

*District Court of the United States, in and for the
Northern District of California, Southern Di-
vision, First Division.*

No. 16,105.

In the Matter of QUAN YOU (Otherwise Known
as LOW JUNE), on Habeas Corpus.

Petition for Appeal.

Comes now Quan You (otherwise known as Low June), petitioner, detained, and appellant herein and says:

That on the 14th day of November, 1916, the above-entitled court made and entered its order denying the petition for a writ of *habeas corpus* as prayed for and filed herein, in which said order certain errors are made to the prejudice of the appellant herein, all of which will more fully appear from the assignment of errors filed herein.

WHEREFORE this appellant prays that an appeal may be granted in his behalf to the Circuit Court of Appeals of the United States for the Ninth Circuit for a correction of the errors so complained of, and further that a transcript of the record, proceedings and papers in the above-entitled cause as shown by the praecipe duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit. It is further prayed that during the pendency of the said appeal, the said appellant may be granted his liberty and remain at large upon a bond in the sum of \$1000, conditioned that he remains within the United States and renders himself in execution of whatever judgment is finally entered herein.

Dated San Francisco, California, this 20th day of November, 1916.

GEO. A. MCGOWAN,
Attorney for Petitioner, Detained and Appellant
Herein. [15]

In the District Court of the United States, in and for the Northern District of California, Southern Division, Division No. 1.

No. 16,105.

In the Matter of QUAN YOU (Otherwise Known as LOW JUNE), on Habeas Corpus.

Assignment of Errors.

Comes now Quan You (otherwise known as Low June), by his attorney, George A. McGowan, Esquire, in connection with his petition, for an appeal herein, assign the following errors which he avers occurred upon the trial or hearing of the above-entitled cause, and upon which he will rely, upon appeal to the Circuit Court of Appeals, for the Ninth Circuit, to wit:

First. That the Court erred in denying the petition for a writ of *habeas corpus* herein.

Second. The Court erred in holding that it had no jurisdiction to issue a writ of *habeas corpus*, as prayed for in the petition herein.

Third. That the Court erred in not holding that the allegation contained in the petition herein, for a writ of *habeas corpus*, were sufficient in law, to justify the granting and issuing of a writ of *habeas corpus*, as prayed for in said petition.

Fourth. That the Court erred in holding that the immigration authorities had accorded the appellant a fair hearing in the executive deportation proceeding.

Fifth. That the Court erred in not holding that

the Secretary of Labor could not issue a warrant of arrest without reasonable cause and not supported by oath of affirmation. [16]

Sixth. That the Court erred in holding that a Chinese person could be tried for being illegally within the United States, in violation of the Chinese Exclusion Laws, under the method and gauge as provided in sections 21 and 22 of the General Immigration Law.

Seventh. That the Court erred in holding that the Secretary of Labor had jurisdiction in an executive deportation proceeding against the appellant, a Chinese person charged with a violation of the Chinese Exclusion and Restriction Acts and not having been charged with a violation of the General Immigration Law.

WHEREFORE, the appellant prays that the judgment and order of the United States District Court, in and for the Northern District of the State of California, made and entered herein in the office of the clerk of the said Court on the 14th day of November, 1916, discharging the order to show cause and dismissing the petition for a writ of *habeas corpus*, be reversed and that this cause be remitted to the said lower court with instructions to discharge the said Quan You (otherwise known as Low June) from custody, or grant him a new trial before the lower court, by directing the issuance of a writ of *habeas corpus*, as prayed for in said petition.

Dated San Francisco, California, November 20th, 1916.

GEO. A. MCGOWAN,
Attorney for Appellant.

Due service and receipt of a copy of the within notice of and petition for appeal and assignment of errors is hereby admitted this 29 day of November, 1916.

JOHN W. PRESTON,
CGH.,

U. S. Attorney, Northern District of California,
Attorney for Respondent.

[Endorsed]: Filed Nov. 29, 1916. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [17]

*In the District Court of the United States, in and
for the Northern District of California, South-
ern Division, Division No. 1.*

No. 16,105.

In the Matter of QUAN YOU (Otherwise Known
as LOW JUNE), on Habeas Corpus.

Order Allowing Petition for Appeal.

On this 29th day of November, 1916, came Quan You (otherwise known as Low June), the petitioner and detained herein, by his attorney, George A. McGowan, Esquire, and having previously filed herein did present to this Court, his petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, intended to be urged and prosecuted by him, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further pro-

ceedings may be had in the premises as may seem proper.

ON CONSIDERATION WHEREOF, the Court hereby allows the appeal herein prayed for, and orders execution and remand stayed pending the hearing of the said case in the United States Circuit Court of Appeals for the Ninth Circuit, that the appellant may be released upon bond in the sum of One Thousand Dollars (\$1,000), and that he remain within the United States, and render himself in execution of whatever judgment is finally entered herein at the termination [18] of said appeal, and that the United States Marshal for this District is authorized to take the detained into his custody for the purpose of effecting his release upon said bond.

Dated San Francisco, California, November 29th, 1916.

M. T. DOOLING,
U. S. District Judge.

[Endorsed]: Filed Nov. 29, 1916. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [19]

(Citation on Appeal—Copy.)

UNITED STATES OF AMERICA,—ss:
The President of the United States, to EDWARD WHITE, Commissioner of Immigration Port of San Francisco and to JOHN W. PRESTON, Esq., U. S. Attorney for the Northern District of California, His Attorney, Greeting:
You are hereby cited and admonished to be and

appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, Southern Division, Division No. One, wherein Quan You (otherwise known as Low June), is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, Southern Division, Div. No. One, this 1st day of December, A. D. 1916.

M. T. DOOLING,

United States District Judge.

Service of the within Citation on Appeal and receipt of a copy thereof is hereby admitted this 1st day of December, 1916.

JNO. W. PRESTON,

U. S. Attorney.

[Endorsed]: Filed Dec. 1, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [20]

(Appearance Bond.)

MASSACHUSETTS BONDING AND INSURANCE COMPANY.

Home Office, Boston, Massachusetts.

(CHINESE PICTURE)

United States of America,
Northern District of California,
Southern Division, Division No. 1,—ss.

BE IT REMEMBERED, That on the — day of December 1916, before me, Thos. E. Hayden, United States Commissioner, of the United States District Court for the Northern District of California, at San Francisco, personally appeared Quan You, otherwise known as Low June, as principal, and Massachusetts Bonding and Insurance Company, a corporation, organized and existing under the laws of the commonwealth of Massachusetts, as surety, and jointly and severally acknowledged themselves to be indebted to the United States of America, in the sum of One Thousand (1,000) Dollars, lawful money of the United States, to be levied and made out of their respective goods, chattels, lands and tenements, to the use of the said United States.

THE CONDITION of the above recognizance is such that WHEREAS there was presented on behalf of the said principal, Quan You, otherwise known as Low June, a petition for a writ of *habeas corpus* and on the 29th day of November, 1916, the Court made its order that said Quan You, otherwise known as Low June be released from his detention

during the further pendency of said petition for a writ of *habeas corpus* and until the further order of the Court in the premises, upon giving a bond in the sum of One Thousand (1,000) Dollars;

NOW, THEREFORE, if said Quan You, otherwise known as Low June, shall personally appear at the District Court of the United States for the Northern District of California, Southern Division, First Division, No. 1, at any time that he may be required to answer and render himself amenable to any and all further orders and processes in the premises and not depart from [21] the said Court, without leave first obtained, and, if ordered remanded into the custody whence taken, will surrender himself in execution thereof, then this obligation to be null and void otherwise to remain in full force and virtue.

QUAN YOU.

MASSACHUSETTS BONDING & INSURANCE CO.

[Surety Seal]

By FRANK M. HALL,

Attorney in Fact.

Taken and acknowledged before me on the day and year first above written.

[Commissioner Seal]

THOMAS E. HAYDEN,

United States Commissioner, Northern District of California, Southern Division, at San Francisco.

Form of bond and sufficiency of the surety is hereby approved.

CASPER A. ORNBAUN,

Asst. U. S. Atty.

[Endorsed]: Filed Dec. 9, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [22]

District Court of the United States, in and for the Northern District of California, Southern Division, First Division.

No. 16,105.

In the Matter of the Application of QUAN YOU
(Otherwise Known as LOW JUNE), on
Habeas Corpus.

**Stipulation and Order Respecting Withdrawal of
Immigration Record.**

IT IS HEREBY STIPULATED and agreed by and between the attorney for the petitioner and appellant herein, and the attorney for the respondent and appellee herein, that the original immigration record in evidence and considered as part and parcel of the petition for a writ of *habeas corpus* upon hearing of the demurrer in the above-entitled matter, may be withdrawn from the files of the clerk of the above-entitled court and filed with the clerk of the United States Circuit Court of Appeals, in and for the Ninth Judicial Circuit, there to be considered as part and parcel of the record on appeal in the above-entitled case with the same force and effect as if embodied in the transcript of the record and so certified to by the clerk of this court.

Dated San Francisco, California, January 15th,
1917.

GEO. A. MCGOWAN,
Attorney for Petitioner and Appellant.

JNO. W. PRESTON,
United States Attorney for the Northern District of
California.

Attorney for Respondent and Appellee. [23]

Order.

Upon reading and filing the foregoing stipulation, it is hereby ordered that the said immigration record therein referred to may be withdrawn from the office of the clerk of this court and filed in the office of the United States Circuit Court of Appeals, in and for the Ninth Judicial Circuit, said withdrawal to be made at the time the record on appeal herein is certified to by the clerk of this court.

Dated San Francisco, California, January 15th,
1917.

M. T. DOOLING,
United States District Judge.

Due service and receipt of a copy of the within stipulation and order is hereby admitted this 15th day of January, 1917.

JNO. W. PRESTON,
U. S. Attorney, Northern District of California,
Attorney for Respondent.

[Endorsed]: Filed Jan. 15, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [24]

*District Court of the United States, in and for the
Northern District of California, Southern Division,
First Division.*

No. 16,105.

In the Matter of the Application of QUAN YOU
(Otherwise Known as LOW JUNE), on
Habeas Corpus.

Order Extending Time to Docket Case.

Good cause appearing therefor, and upon notice of George A. McGowan, Esquire, attorney for the appellant herein, it is hereby ordered that the time within which the record in the above-entitled cause may be docketed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit is hereby extended for a period of twenty days from and after the date hereof.

Dated San Francisco, California, December 27th, 1916.

WM. H. HUNT,
United States Judge.

Due service and receipt of a copy of the within order is hereby admitted this 27 day of Dec., 1916.

JNO. W. PRESTON,
U. S. Attorney, Northern District of California,
Attorney for Respondent.

[Endorsed]: Filed Dec. 27, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [25]

*District Court of the United States, in and for the
Northern District of California, Southern Division,
First Division.*

No. 16,105.

In the Matter of the Application of QUAN YOU
(Otherwise Known as LOW JUNE), on
Habeas Corpus.

(Order for Extension of Time for Docketing.)

Good cause appearing therefor, and upon motion of George A. McGowan, Esquire, attorney for the appellant herein, it is hereby ordered that the time within which the record in the above-entitled cause may be docketed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit is hereby extended for a period of twenty days from and after the date hereof.

Dated San Francisco, California, January 12th, 1917.

M. T. DOOLING,
United States District Judge.

Due service and receipt of a copy of the within is hereby admitted this 12th day of January, 1917.

JNO. W. PRESTON,
U. S. Attorney, Northern District of California,
Attorney for Respondent.

[Endorsed]: Filed Jan. 12, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [26]

*District Court of the United States, in and for the
Northern District of California, Southern Division,
First Division.*

No. 16,105.

In the Matter of the Application of QUAN YOU
(Otherwise Known as LOW JUNE), on
Habeas Corpus.

(Order Extending Time to Docket Case.)

Good cause appearing therefor, and upon motion of George A. McGowan, Esquire, attorney for the appellant herein, it is hereby ordered that the time within which the record in the above-entitled cause may be docketed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, is hereby extended for a period of thirty (30) days from and after the date hereof.

Dated San Francisco, California, January 31st,
1917.

M. T. DOOLING,

United States District Judge.

The foregoing extension of time is hereby stipulated and agreed to by and between the counsel for the respective parties hereby.

JNO. W. PRESTON,

United States Attorney for the Northern District of
California,

Attorney for Respondent and Appellee.

GEO. A. MCGOWAN,

Attorney for Petitioner and Appellant.

[Endorsed]: Filed Jan. 31, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [27]

**Certificate of Clerk U. S. District Court to
Transcript on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing 27 pages, numbered from 1 to 27, inclusive, to contain a full, true and correct transcript of certain records and proceedings, in the matter of Quan You, etc., on *habeas corpus*, No. 16,105, as the same now remain on file and of record in the office of the clerk of said District Court; said transcript having been prepared pursuant to and in accordance with "Praeceptum for Transcript on Appeal," and the instructions of the attorney for petitioner and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Twelve Dollars and Eighty Cents (\$12.80), and that the same has been paid to me by the attorney for appellant herein.

Annexed hereto is the original citation on appeal, issued herein, page 29.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of February, A. D. 1917.

[Seal]

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk.

(Citation on Appeal—Original.)

UNITED STATES OF AMERICA,—ss.

The President of the United States, to EDWARD WHITE, Commissioner of Immigration, Port of San Francisco, and to JOHN W. PRESTON, Esq., U. S. Attorney for the Northern District of California, his Attorney, Greeting.

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, Division No. One, wherein Quan You (otherwise known as Low June) is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, Southern Division, Div. No. One, this 1st day of December, A. D. 1916.

M. T. DOOLING,
United States District Judge.

[Endorsed]: No. 16,105. United States District Court for the Northern District of California, Southern Division, Division No. One. Quan You (Otherwise Known as Low June), Appellant, vs. Edward White, Commissioner of Immigration. Citation on Appeal. Filed Dec. 1, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

Service of the within Citation on appeal and receipt of a copy thereof is hereby admitted this 1st day of December, 1916.

JNO. W. PRESTON,
U. S. Attorney.

[Endorsed]: No. 2945. United States Circuit Court of Appeals for the Ninth Circuit. Quan You, Otherwise Known as Low June, Appellant, vs. Edward White, as Commissioner of Immigration at the Port of San Francisco, California, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division. Filed March 1, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

Certificate of Clerk U. S. District Court to Original Exhibits.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the accompanying exhibits, namely, Respondent's Exhibits "A" and "B," to be original exhibits introduced and filed in the Matter of Quan You, etc., on Habeas Corpus, No. 16,105, and are herewith transmitted to the United States Circuit Court of Appeals, for the Ninth Circuit, as per order filed in this Court, a copy of which is embodied in the transcript on appeal, herewith.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of February, A. D. 1917.

[Seal]

WALTER B. MALING,

Clerk.

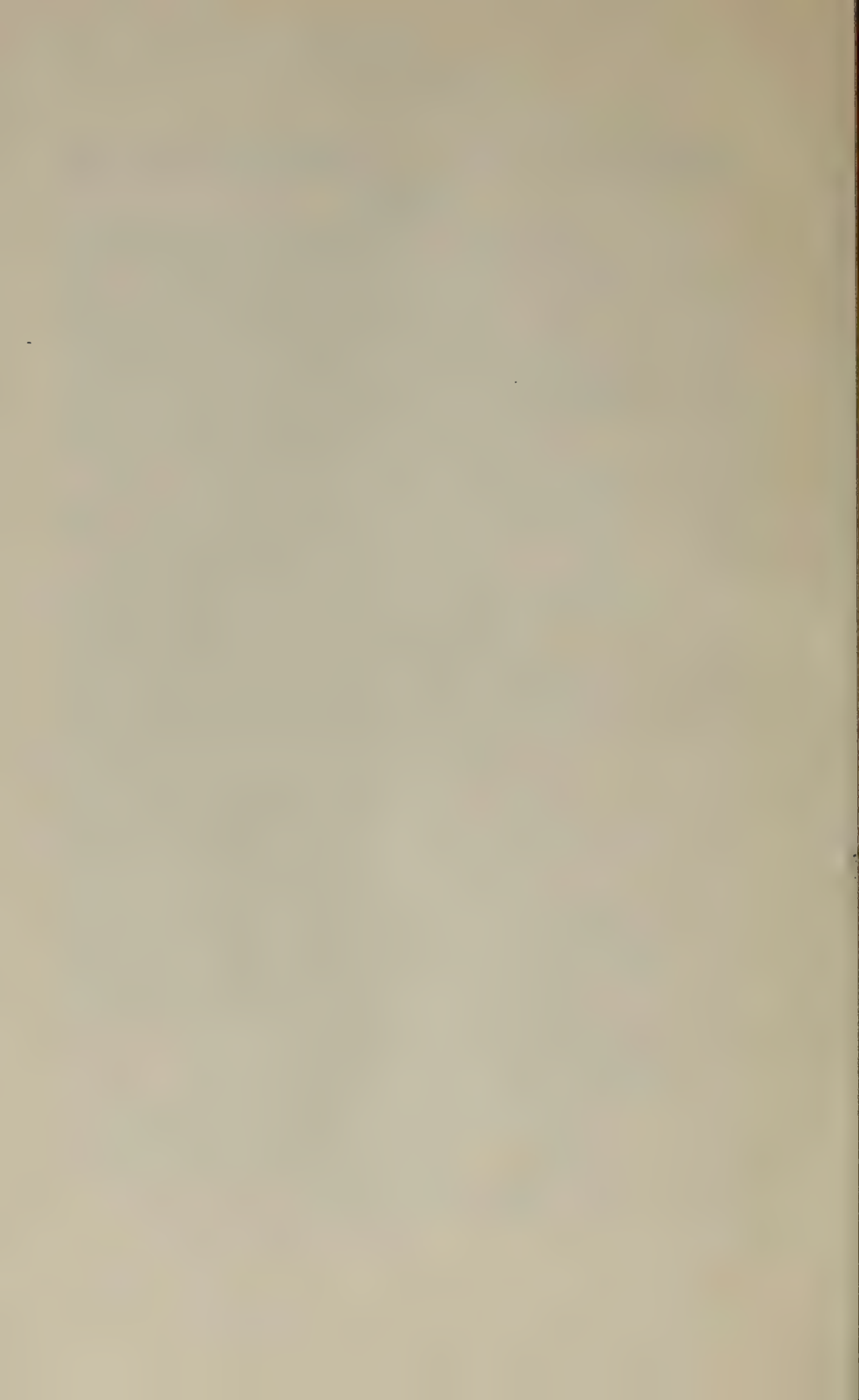
By C. W. Calbreath,

Deputy Clerk.

CMT.

[Endorsed]: No. 16,105. U. S. District Court, Northern District of California, First Division. In the Matter of Quan You, Otherwise Known as Low June, on *Habeas Corpus*. Certificate of Clerk U. S. District Court to Original Exhibits.

No. 2945. United States Circuit Court of Appeals for the Ninth Circuit. Certificate of Clerk U. S. District Court to Original Exhibits. Filed Mar. 1, 1917. F. D. Monekton, Clerk.



IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

In re:

QUAN YOU, otherwise known as LOW JUNE, on
Habeas Corpus,

Appellant,

vs.

EDWARD WHITE, as Commissioner, etc.

Appellee.

Brief for Appellant

Filed

MAY 26 1917

F. D. Monckton,
Clerk.

GEO. A. McGOWAN,
Attorney for Appellant.
Bank of Italy Building,
San Francisco, California.

Filed this.....day of May, 1917.

Frank D. Monckton, Clerk.

By.....Deputy Clerk.

No. 2945

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

In re:

QUAN YOU, otherwise known as LOW JUNE, on
Habeas Corpus,

Appellant,

vs.

EDWARD WHITE, as Commissioner, etc.

Appellee.

Brief for Appellant

STATEMENT OF THE CASE.

Quan You, otherwise referred to as Low June, is an alien Chinese person, who returned from a temporary visit to China about the middle of the year 1914, and made application to re-enter the United States as a Chinese Merchant, returning to a commercial domicile therein. As evidence of his right to re-enter, he presented an approved or "O. K."

Merchants Form 431 Return Certificate. This certificate had been issued to him by the Commissioner of Immigration for the Port of San Francisco just prior to his recent departure for China. It was issued after a thorough examination in which it was established by the testimony of two credible witnesses other than Chinese, that he was a merchant and a member of Hing Kee & Co., which is a firm engaged in buying and selling merchandise at a fixed place of business, at 427 Harrison Street, in the City of Oakland, County of Alameda, State of California; that he had been such a merchant for upwards of one year prior thereto, and that during said time he had engaged in no manual labor save and excepting only such as was incumbent upon him in his conduct as such merchant. This claim was also amply supported by the testimony of the manager of the firm, and this appellant, and was further corroborated by the partnership books. An examination of the store showed it to be a *bona fide* mercantile establishment, with none of the prohibitive features. The Commissioner of Immigration for the Port of San Francisco was satisfied, and thereupon approved the form 431 Merchants departure certificate. The appellant went to China thereon, and upon his return he was passed by the Immigration authorities, and landed under the Chinese Exclusion Act, and resumed his residence within the United States on May 11, 1914 (Tr. 5 and 6; Ex. "B".)

The appellant was thereafter arrested in Alabama upon a warrant of arrest issued by the Secretary of Labor charging him with being illegally within the

United States, and after a hearing he was ordered deported by the Secretary of Labor upon the ground that

“Under Section 21 of the Immigration Act approved February 20th, 1907, being subject to deportation under the provisions of a law of the United States, to-wit, the Chinese Exclusion laws, for the following among other reasons:

“That he has been found within the United States in violation of section 6, Chinese-Exclusion act of May 5, 1892, as amended by the Act of November 3, 1893, being a Chinese Laborer not in possession of a certificate of residence; and that he has been found within the United States in violation of section 2, Chinese-Exclusion act of November 3, 1893, having secured admission by fraud, not having been at time of entry a lawfully domiciled exempt returning to resume a lawfully acquired domicile and to follow an exempt pursuit in this country.”

(Tr. 3 Ex. “A”.)

The appellant was accorded no hearing before either a Justice, Judge or Commissioner of the Judicial branch of the government.

Upon appellant's arrival at San Francisco, a petition for a writ of habeas corpus was presented (Tr. 2 to 9) upon the return of the order to Show Cause (Tr. 10) the Immigration Record was by stipulation filed as a part of the Petition (Tr. 11.) A demurrer was filed (Tr. 12 and 13) and an order made sustain-

ing it and denying the Petition (Tr. 13.) This appeal is taken therefrom.

POINTS URGED.

1. The appellant is a Chinese alien, and if illegally here, is entitled to have that fact determined by the Judicial Branch of the Government, and the Secretary of Labor is without jurisdiction in the premises.

2. That the Executive hearing was unfair, the defendant not being notified of his right to inspect the record, or being informed of the evidence presented against him, or of his right to be present at any future hearings to be had, and being prevented by the inadequacy of his arraignment from knowing how he could be benefited by having counsel to defend him.

FIRST:

Upon this point it is urged that the appellant did not enter the United States in violation of the Immigration Law, and it is only by a forced, unnatural and we feel unwarranted construction of the facts, that this point is rendered seemingly, but not in fact, tenable.

The Chinese regulations provide for a prior examination of all applicants for admission, under the General Immigration Law, and that the case shall not be examined under the Chinese Acts until it has been passed under the General Immigration Act. This point has been before the lower court, and its views thereon are registered in the case of *ex parte* Wong Tuey Hing 213 Fed. 112.

We may pass from this feature to the real point, and that is whether a person of Chinese descent charged with entering the United States and being therein in violation of the Chinese Exclusion Acts, may be deported in the manner provided for in the General Immigration Law? If the infraction is a surreptitious entry, that is, an entry without inspection, this may be done *U. S. vs. Wong You* 223 U. S. 67; If the infraction is moral dereliction, this may be done, *Low Wah Suey vs. Backus*, 225 U. S. 460; *Looe Shee vs. North* 170 Fed. 566; If the bar is a dangerous, contagious and loathsome disease, it may be done. In *re Lee Sher Wing*, 164 Fed. 506.

The point here is not substantially a violation of the General Immigration Law, but a claimed violation of the Chinese Exclusion Act. The Chinese Ex-

clusion Act provides its own method of deportation, which embraces a Judicial hearing before a justice, judge or commissioner. Section 43 of General Immigration Act provides that it "*shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent,*" Section 21 of the General Immigration Act providing for the machinery for deportations under that act includes therein all persons liable to deportation under that act, "*or of any other law of the United States.*" Now the contention of the government is that the use of the phrase "*or of any other law of the United States,*" gives them the right to arrest, try and deport in the manner provided for in the General Immigration Act, Chinese persons for a violation of solely the Chinese Exclusion Acts. We contend that this would be altering or amending the Chinese Exclusion Acts to the extent of substituting an *executive* hearing for a *judicial* hearing, and is prohibited by said section 43. The cases relied upon by the appellant are:

Ex parte Wong Tuey Hing 213 Fed. 112.

Ex parte Woo Jan, 228 Fed. 927.

U. S. vs. Prentis 230 Fed. 935.

Affirmed C. C. of A. 7th Ct., Oct. term 1916,
January session. (Not reported yet.)

Lee Wong Hin vs. Mayo 240 Fed. 368, C. C.
of A., 5th Ct.

We interpret the clause "*or any other law,*" as used in this section, to mean merely that when a judicial order of deportation is ready for execution, then the actual deportation may be executed as provided in the General Immigration Law, not that the procedure of arrest and trial shall be had as therein provided. The Chinaman has a substantial right in a *judicial hearing*, which with its greater rights and privileges, better enables him to defend himself against the charge so brought against him. When his judicial hearing is over, and the judgment is a finality, he is only then, in the sense used in the act "liable to deportation" and he cannot be heard to complain whether he be deported by the U. S. Marshall or turned over by that officer to the Immigration officers, for them to place him on the steamer.

The only advantage to the Government which we feel was intended was that the expense or procedure, as the case may be, of providing tickets, etc. would all be in the hands of the Immigration Department, and kept in one uniform account, and their statistical records and research thereof, would be simplified by all being placed through the medium of one set of deportation officers. This interpretation is well within the line of reason and is in harmonious accord with the true operation of both acts, and does not permit the one to encroach upon the other. This construction is in harmonious accord with the statute itself. Section 20 of the General Immigration Law provides for the *hearing* and Section 21 of the *method of actual deportation after* the termination of the hearing, and it is only in the latter section that the phrase "*or of any other law of the United States*" is used.

SECOND.

Under the head of the inadequacy and unfairness of the hearing, we direct attention to the following specific things which we believe constitute acts of unfairness, which have prevented the detained from a fair and impartial hearing to which he is entitled under the statute and the regulations, and further showing that for said reasons the proceedings herein are null and void.

(a) The first point which we desire to urge is that the warrant of arrest in this case is issued in violation of Article 4 in Amendment to the Constitution of the United States in that the warrant of arrest was issued and was not based "upon probable cause, supported by oath or affirmation." The legal presentation of this point is now under submission of this court in case No. 2859, Chin Ah Yoke alias Jane Doe, Appellant, vs. Edward White, as commissioner, etc., taken under submission at the February term of this court, and reference is made to pages 21 to 27 inclusive of the brief for appellant, filed in said matter, for the presentation of the legal view raised upon behalf of the appellant herein on said point.

(b) The Immigration regulations promulgated which govern such executive deportation proceedings are found in Rule 22 sub. 4 as follows:

"Executive of warrant of arrest and hearing thereon:

(a) Upon receipt of a warrant of arrest the alien shall be taken before the person or persons

therein described and granted a hearing to enable him to show cause, if any there be, why he should not be deported.

(b) During the course of the hearing the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued; and at such stage thereof as the officer before whom the hearing is held shall deem proper, he shall be apprised that he may thereafter be represented by counsel and shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the further conduct of the hearing, to inspect and make a copy of the minutes of the hearing, so far as it has proceeded, and to offer evidence to meet any evidence theretofore or thereafter presented by the Government. Objections and exceptions of counsel shall not be entered on the record, but may be dealt with in an accompanying brief."

The defendant in this deportation proceeding was arrested and a hearing accorded under said warrant on July 28th, 1916, before Inspector Worden at Ensley, Alabama. The examination of the defendant comprises some 11 pages of single spaced examination, and at the conclusion thereof is found the following proceedings which were meant to consist and be an arraignment of the defendant in which he should be informed of his rights, which are the identical rights set forth in the foregoing extracts of rules

and regulations. The concluding part of the examination which was sought to be a compliance with the regulations, is as follows :

“Q. I can produce a witness who will testify that you left Tuscaloosa in the early part of 1912 for San Francisco with the intention of going to China?

A. No, I went to China from Hing Kee & Co. store.

Q. Do you deny that you were in Tuscaloosa in the early part of 1912 running the Loo June laundry?

A. No, I was not in that place in 1912.

Q. This hearing is granted you in order that you may show cause why you should not be deported to the country whence you came in conformity with law. Is there anything further you wish to say as to why you should not be deported?

A. How can you deport me to China when I am not a laborer. I just came here to collect money for the firm of Hing Kee & Co., and I have a certificate that I am a merchant.

Q. Yes, you have a certificate that you were admitted as a merchant but I have found you doing laundry work,—laboring?

A. Yes, but I was not working for myself, I was just helping,—the laundry does not belong to me.

Q. Is there anything further you wish to say as to why you should not be deported?

A. No.

Q. Under the terms of the warrant upon which you have been arrested, you may be released upon giving a bond in the sum of \$1000. Are you in a position to give that bond?

A. I have two friends in Birmingham who can go on my bond.

Q. You have a right to be represented by a lawyer at this hearing if you so desire. Do you wish to employ one to represent you?

A. No."

It will be noticed in the foregoing proceedings, that the Inspector did not notify the defendant that he was entitled to inspect or see the record in his case, did not advise him that he was entitled to know the evidence submitted against him, or see or inspect the evidence upon which the warrant was based, nor was he advised that there were to be any future or further or other hearings in the said case, and finally, he was not advised of his right to have a brief or counter showing made on his behalf, all of which the regulations presuppose the defendant shall be advised of. Owing to the inadequacy of the substance of the information conveyed to this defendant of his rights in the premises, he quite naturally stated that he did not want an attorney, because it is obvious that he could not see what use an attorney could be to him. He had been taken up and thoroughly examined without an attorney, or without being notified that he could have an attorney, and then, at the conclusion of the examination, when an attorney could be of no service to him that he knew of, he was told he

might have one, but for what purpose, he was not informed.

It is respectfully submitted that whether an alien accepts counsel or not, he certainly is entitled to be present at all future or other hearings had in his case. If an alien elects to stand trial without an attorney, that does not mean that he shall not himself have the right to be present at any future hearings. It appears in the record contained in Exhibit "A," that the day following the hearing upon which the proceedings hereinbefore quoted were had, the Immigration Inspector conducted another hearing in the case of this defendant, without having given him notice, or permitting him to be present, and at this hearing a witness by the name of Lunie Dunn was examined under oath, and gave testimony detrimental to the defendant. That the defendant was not present at the examination is shown by an inspection of the caption thereof, and is also shown by the fact that the witness under examination had to identify the defendant by photographs in the possession of the examining immigration Inspector. Presumably this witness Lunie Dunn, is the witness referred to by the examining Inspector in the concluding portion of his examination of the defendant, but it nowhere appears in the record that the defendant was notified that this examination was to take place, or given or afforded any opportunity of being thereat in person, or with an attorney.

The fact that the defendant in this matter was inadequately informed of his rights, and to that extent prevented from employing an attorney at the time of

the hearing, is shown by the fact that after the conclusion thereof, he did employ an attorney, who addressed letters to the immigration officials, trying to find out something about the status of the case of the defendant, presumably for the purpose of submitting some kind of a defense. Unbeknown to the defendant, he was even at that time under an order of deportation, but it appears from the correspondence that he was designedly not notified of that fact. It does appear from the record that the immigration Inspector who received the letter from the attorney, wrote to the Department at Washington, for information, as to what attention he should pay to this letter from the attorney, and that is about all that the immigration record discloses was done with respect to enlightening the attorney, who finally sought to appear upon behalf of the defendant. It is respectfully submitted upon this point, that this hearing falls far short of affording the defendant a fair or adequate opportunity of presenting a defense to the charge made against him. It is of course, obvious that the convenience of the Immigration officers should be respected, but we do not feel that the rights of the defendant are to be entirely sacrificed to the convenience of these officers, who travel through the country holding these investigations. The hearings seem to be conducted to suit the convenience of the Government in presenting their case against the defendant, but it does not seem to be such a hearing as affords the defendant any fair opportunity to present a defense. Certainly, if he does not know what evidence is offered against him, he does not know whether he

needs an attorney to defend him, or whether he needs to present any defense other than his own sworn testimony, which was presented in this case. Upon the holding of the court in the following cases, it is respectfully submitted that the judgment in this case should be reversed.

We think the particular elements of unfairness of the hearing set forth herein warrant the issuance of the writ of habeas corpus as prayed for in the petition in this matter, upon the ground that the hearing accorded was unfair upon the authority of the following decisions :

Low Wah Suey vs. Backus 225 U. S. 460.

Chin Yow vs. U. S. 208 U. S. 8.

Wong Yee Toon vs. Stump 233 Fed. 194.

Whitfield vs. Hanges 222 Fed. 745.

Ong Chew Lung vs. Burnett 232 Fed. 853.

Chan Kam vs. U. S. 232 Fed. 855.

Ex parte Lam Pui 217 Fed. 456.

Ex parte Lam Fuk Tak 217 Fed. 468.

McDonald vs. Sin Tak Sam 225 Fed. 710.

U. S. vs. Williams 200 Fed. 538.

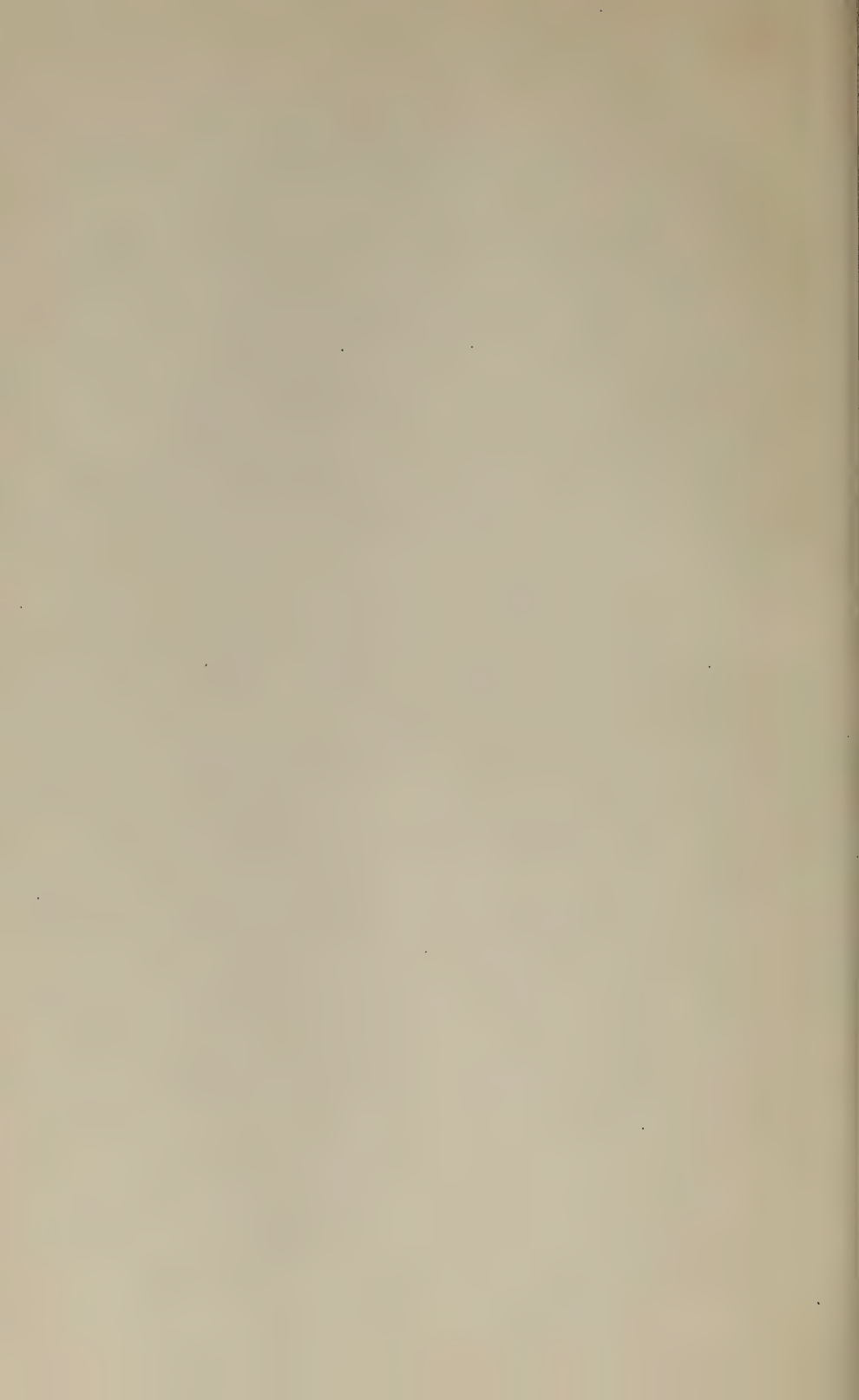
U. S. vs. Williams 189 Fed. 915.

U. S. vs. Williams (affirmed) 206 Fed. 460.

U. S. vs. Williams 175 Fed. 274.

Respectfully submitted,

GEO. A. McGOWAN,
Attorney for Appellants.



No. 2945

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In re QUAN YOU, otherwise known as
 LOW JUNE, on Habeas Corpus,
Appellant,

vs.

EDWARD WHITE, as Commissioner,
 etc.
Appellee.

GOVERNMENT'S REPLY BRIEF

JOHN W. PRESTON,
 United States Attorney,
 CASPER A. ORNBAUN,
 Asst. United States Attorney,
Attorneys for Appellee.

Filed

JUL 20 1917

Filed this.....day of July, 1917. **F. D. Monckton**

FRANK D. MONCKTON, Clerk,

Clerk

By....., Deputy Clerk.

No. 2945

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In re QUAN YOU, otherwise known as
LOW JUNE, on Habeas Corpus,
Appellant,

vs.

EDWARD WHITE, as Commissioner,
etc.

Appellee.

GOVERNMENT'S REPLY BRIEF

STATEMENT OF THE CASE.

The defendant in this case is a citizen of China, and a person of the Chinese race. He was arrested under warrant of July 21st 1916 on the grounds that he was subject to be taken into custody and returned to the country whence he came under section 21 of the Immigration Act approved February 20th, 1907, being subject to deportation under the provisions of the laws of the United States, to wit, the Chinese Exclusion laws for the following, among other, reasons: That he was

found within the United States in violation of section 6 of the Chinese Exclusion Act of May 5th, 1892 as amended by the Act of November 3rd, 1893, being a Chinese laborer not in possession of his certificate of residence, and that he has been found within the United States in violation of section 2 of the Chinese Exclusion Act of November 3rd 1893, having secured admission by fraud, the said defendant not having been, at the time of his entry, a lawfully domiciled exempt returning merchant.

The defendant departed the United States for China on June 28th 1912, and prior to his departure he made an application for a merchant's return certificate, form 431. In order to obtain this, it was necessary for him to establish the fact that he was a merchant and that he had been such merchant for upwards of one year prior to his departure.

This fact was established to the satisfaction of the Immigration officials prior to the departure of the said defendant. The defendant went to China, and returned May 11th 1914, at which time he presented the return certificate which he had obtained prior to his departure, and which indicated that he was entitled to return as a merchant.

After entering the United States, this defendant was arrested upon the ground that he had re-entered the United States through fraud, inasmuch as he had fraudulently obtained his merchant's certificate, the evidence presented at the time of the hearing indicating that at the time defendant claimed to be

a merchant, he was in fact engaged in the laundry business.

ASSIGNMENTS OF ERROR.

The appellant assigns the following reasons for a reversal of the ruling of the lower court, namely:

1. "That the appellant is a Chinese alien, and if illegally here, is entitled to have that fact determined by the Judicial Branch of the Government, and the Secretary of Labor is without jurisdiction in the premises.

2. That the Executive hearing was unfair, the defendant not being notified of his right to inspect the record, or being informed of the evidence presented against him, or of his right to be present at any future hearings to be had, and being prevented by the inadequacy of his arraignment from knowing how he could be benefited by having counsel to defend him."

There have been so many well-defined decisions by the Court of this Circuit, as well as the courts of other Circuits of the United States, that it seems useless for the Government to dwell long upon the first contention of appellant. The following cases are ample authority for giving the Secretary of Labor jurisdiction in determining such cases as the one now before the Court:

Ex parte Owe Sam Goon, 235 Fed. 847 (C. C. A. 9th)

Wong Bock Sue vs. Connell, 233 Fed. 659 (C. C. A. 9th)

Sibray vs. U. S. 227 Fed. 1 (C. C. A. 3rd)

U. S. vs. Sisson, 232 Fed. 598 (C. C. A. 2nd)

Moy Wing Sun vs. Prentis, 234 Fed. 24 (C. C. A. 7th)

Lo Pong vs. Dunn, 235 Fed. 510 (C. C. A. 8th)

Ex parte Lam Pui, 217 Fed. 456 (D. C.)

U. S. vs. Sisson, 222 Fed. 693 (D. C.)

Ex parte Lee Ying, 225 Fed. 335 (D. C.)

Ex parte Woo Shing, 226 Fed. 141 (D. C.)

Ex parte Chun Woi San, 230 Fed. 538 (D. C.)

(In this last case (*Chun Woi San*), Judge Dooling said he had denied authority of Secretary in *Wong Tuey Hing*,—cited by McGowan in his brief—because his attention had not been called to section 21 of the Immigration Act.)

In reply to the second contention concerning the unfairness of the hearing, the Government desires to call the attention of the Court to the fact that this case was presented in the same manner that practically every immigration case is presented that comes before the Department. In the first place, the defendant was arrested upon a warrant, the warrant was read to the defendant and fully explained, as is shown on page 30 of the Original Record of the Bureau of Immigration now on file and marked Respondent's Exhibit "A".

The arraignment of the defendant, which is fully shown on page 20 of the said record of the Bureau

of Immigration, shows conclusively the fairness on the part of the Immigration officials in the conduct of this case. The portion of the arraignment to which the Court's attention is directed, is as follows:

“Q. You stated at San Francisco that after the store was closed in K. S. 26 you became a laundryman at Tuscaloosa, Ala. Is that correct? A. Yes, I remember it just as you mentioned it,—if you had not mentioned it I would not have remembered.

Q. What year was that? A. I don't remember.

Q. Where was your laundry located at Tuscaloosa? A. No. 2210 Broad St.

Q. How long did you run that laundry there? A. I don't remember very well, but five or six years.

Q. When did you give up that laundry business at No. 2210 Broad St., Tuscaloosa, Ala.? A. About 1907 or 1908.

Q. What was the name of that Laundry? A. I don't remember.

Q. You remember a while ago and said it was the Loo June laundry? A. Yes, as you mention it I remember.

Q. By what name were you known in Tuscaloosa during those 5 or 6 years you were there. A. I was known by the name that was on the Laundry, Loo June.

Q. Who did you have working for you at that time? A. I had two colored women.

Q. What were their names? A. One was Lunie.

Q. What was her other name? A. King.

Q. King or Dunn? A. I knew her by the name of King.

Q. Was she a little woman or a big woman? A. Big woman.

Q. How long did she work for you? A. 4 or 5 years.

Q. You say you were known in Tuscaloosa by the name of Loo June? A. Yes.

Q. When did you leave Tuscaloosa? A. I think in 1908.

Q. Did you go back there at any time after that? A. No, I went to San Francisco and joined Hing Kee & Co. store.

Q. Who did you rent the building from in which your laundry was located in Tuscaloosa? A. Mr. Moody, he is the boss of the First National Bank.

Q. I can produce a witness who will testify that you left Tuscaloosa in the early part of 1912 for San Francisco with the intention of going to China? A. No, I went to China from Hing Kee & Co. store.

Q. Do you deny that you were in Tuscaloosa in the early part of 1912 running the Loo June laundry? A. No, I was not in that place in 1912.

Q. This hearing is granted you in order that you may show cause why you should not be deported to the country whence you came in conformity with law. Is there anything further you wish to say as to why you should not be deported? A. How can you deport me to China when I am not a laborer—I just came here to collect money for the firm of Hing Kee & Co., and I have a certificate that I am a merchant.

Q. Yes, you have a certificate that you were admitted as a merchant, but I have found you doing laundry work,—laboring? A. Yes, but I am not working for myself, I was just helping—the laundry does not belong to me.

Q. Is there anything further you wish to say as to why you should not be deported? A. No.

Q. Under the terms of the warrant upon which you have been arrested, you may be released upon giving a bond in the sum of \$1,000. Are you in a position to give that bond? A. I have two friends in Birmingham who can go my bond.

Q. You have a right to be represented by a lawyer at this hearing if you so desire. Do you wish to employ one to represent you? A. No.”

It will be seen from the foregoing that the defendant's attention was called to the fact that the Immigration officials were familiar with his having conducted a laundry at Tuscaloosa during the same

period that said defendant claimed to have been a merchant prior to his departure to China.

It further appears in said arraignment that the defendant's attention was sufficiently called to the fact that the Immigration officials were in possession of, and would in fact introduce in evidence in support of the warrant of deportation, the testimony of defendant's employees who worked for him in said Tuscaloosa laundry during the same period that the said defendant claimed to have been a merchant.

It is true that the defendant was not present at any hearings subsequent to the arraignment, but the mere fact that he stated that he did not desire an attorney, and his attention was directed to the testimony on which the Immigration officials based their decision, is sufficient to show a lack of any unfairness.

The Government calls attention to the testimony of Lunie Dunn referred to by the Immigration officials in the arraignment of said defendant which proves beyond question the fact that the defendant was not a merchant during the period that he claimed to be a merchant prior to his departure for China, but was in fact engaged in the laundry business. This testimony is as follows:

Q. What is your name? A. Lunie Dunn.

Q. Where do you live? A. 15th Street next door to Mr. Mack Malone, West End, Tuscaloosa, Ala.

Q. What is your occupation? A. I am charwoman United States Post Office Building.

Q. I show you a photograph (photograph attached to 'Application and Receipt for Certificate of Identity', San Francisco record No. 13406/16-5) and will ask you if you recognize the same as being of any one you know? A. Yes, this is certainly Loo June.

Q. How long have you known Loo June? A. I have known him about ten years.

Q. While he was in Tuscaloosa? A. Yes sir.

Q. What did he do while here? A. He worked in a laundry.

Q. His own laundry? A. Yes, sir, he bought it out from old man Lee Loy.

Q. Where was his laundry located? A. No. 2210 Broad Street, Tuscaloosa, Ala.

Q. Was he a laundryman all the time you knew him? A. Yes sir.

Q. Do you remember when he first came to Tuscaloosa? A. I don't remember what year.

Q. Do you know where he came from? A. Yes sir, he came from Marion, Ala.—that is what he told me; he told me he had a laundry there for six years.

Q. Was Loo June a Chinaman? A. Yes sir.

Q. When did he leave Tuscaloosa? A. 1912.

Q. How do you know that? A. I was operated on in March at the Williamson & Falks

Infirmary, and Loo June could not leave then until I got well, because his brother could not speak plain English, and he wanted me to stay there and help him out and teach him. I was in the Infirmary one week and stayed home five weeks, and then I went back to work for Loo June again and worked for him until I came over here two years ago last April.

Q. Did Loo June leave after you returned to work? A. Yes sir, the next day.

Q. Do you know where he went to? A. California, and from there to China.

Q. That would make it about May that he left here then? A. Yes sir.

Q. May, 1912? A. Yes sir.

Q. Do you know whether he went to China or not? A. Yes, his brother got letters from him in China all the while, in which he sent regards to me and my daughter. His father had sent for him to come to San Francisco on account of some property, but on account of my illness and his delay in leaving, his father departed for China before Loo June got to California, as he wanted to die there, and Loo June went on to China, and he wrote a letter back to his brother, Loo Wee, that while he was on his way to China his father had died in China. That letter affected Loo Wee so much that he nearly lost his mind, and he would lose the customers' clothes.

Q. When did Loo June return to the United States? A. I don't know positively, but it was

three or four months after I commenced to work here in the Post Office in 1914.

Q. I show you another picture of Loo June (photograph attached to form 431 in San Francisco record No. 13406/16-5) and ask you if you recognize the same? A. Yes sir, that is also Loo June, I know him,—I was there long enough to know him.

Q. Do you know whether he was known by any other name? A. No sir, that was the name he brought here and the one by which he was known in Tuscaloosa.

Q. There is no doubt as to that photograph being Loo June, is there? A. No sir.

Q. And he was a laundryman all the time he was in Tuscaloosa up to the time he left about May, 1912, for China? A. Yes sir."

A review of the memorandum prepared for the Secretary, which appears upon pages 36 to 38 of the said Record of the Bureau of Immigration, will show at once all of the facts considered by the Secretary of Labor in the determination of this case, and the Government calls attention to these pages rather than to set forth more fully the testimony upon which the decision of the said Secretary was based.

It is well established that unless the proceedings of the Immigration Bureau were manifestly unfair and were such as to prevent a fair investigation, its determination will not be disturbed, and in support

of this proposition the Government calls attention to the same decisions set forth by the appellant in his brief and to the following case of

Tang Tun vs. Edsell, 223 U. S. 673.

The findings of the Secretary of Labor are final and conclusive unless there is a showing that there was an unfairness.

Ekiu vs. U. S. 142 U. S. 651

Lee Lung vs. Patterson, 186 U. S. 170

The Japanese Immigrant case, 189 U. S. 86

Tang Tun vs. Edsell, 223 U. S. 673

Low Wah Suey vs. Backus, 225 U. S. 460

U. S. vs. Ju Toy, 198 U. S. 253

Zakonaite vs. Wolf, 226 U. S. 272

Chin Yow vs. U. S. 208 U. S., 8

Healy vs. Backus, 221 Fed. 358.

The Government is of the opinion that the proceedings to which the Court's attention has already been called, are sufficient to show that there was no unfairness on the part of the Immigration officials, and that the defendant was accorded every right to which he was entitled. The mere fact that the defendant did not request an attorney is sufficient to show that he was not desirous of refuting any of the evidence introduced by the Immigration officials, and inasmuch as the testimony shows so conclusively

that the defendant was engaged in the laundry business, when as a matter of fact he pretended to be a merchant, the order of the Secretary of Labor and the rule of the lower court should not be disturbed.

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. U. S. Attorney.

Attorneys for Appellee.



8

No. 2945

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

In re:

QUAN YOU, otherwise known as Low June,
Appellant,

VS.

EDWARD WHITE, as Commissioner, etc.,
Appellee.

Appellant's Petition for a
Rehearing

Filed

SEP 19 1917

F. D. Monckton,
Clerk.

GEO. A. MCGOWAN,
Attorney for Appellant,
Bank of Italy Building,
San Francisco, California.

Filed this.....day of September, 1917.
Frank D. Monckton, Clerk.

By.....Deputy Clerk.

No. 2945

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

In re:

QUAN YOU, otherwise known as Low June,
Appellant,

vs.

EDWARD WHITE, as Commissioner, etc.,
Appellee.

Appellant's Petition for a
Rehearing

*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:*

This appellant humbly presents this his petition for a rehearing based upon the fact that since the hearing herein the statute under which this proceed-

ing was had, has been changed by Congress in such a way as to indicate, we respectfully submit, that the statutory construction we had formerly urged in this matter was well taken as correctly interpreting the former intention of Congress. This assertion seems well founded in the light of certain changes in the new General Immigration Law hereinafter set forth.

The first point urged by the appellant was that being a Chinese person if illegally here, he is entitled to have that fact determined by the judicial branch of the government. If the ILLEGALITY in question arises from the Chinese Exclusion or Expulsion Laws, such a hearing is mandatory according to the terms of the said laws; but the General Immigration Act in Section 21, providing the machinery of deportation by Executive Warrant and hearing, for those liable to deportation thereunder also contains the phrase "OF ANY OTHER LAW OF THE UNITED STATES"; while section 43 of the last mentioned act provides that it "SHALL NOT BE CONSTRUED TO REPEAL, ALTER, OR AMEND EXISTING LAWS RELATING TO THE IMMIGRATION OR EXCLUSION OF CHINESE PERSONS OR PERSONS OF CHINESE DESCENT." Obviously if the appellant is here in violation of the General Immigration Law, he may be deported by the machinery therein provided, notwithstanding the fact that the particular infraction of the General Immigration Law was also a violation of the earlier Chinese Ex-

clusion or Expulsion Laws. The reason is that any alien other than Chinese might also be deported for the same infraction of the General Immigration Law. ANY ALIEN may surreptitiously enter the United States without inspection, and ANY SUCH ALIEN, including Chinese, may be summarily arrested by executive warrant and so deported. This was the holding of the Supreme Court in *U. S. vs. Wong You*, 223 U. S. 67. ANY ALIEN may become morally objectionable and hence ANY SUCH ALIEN, including Chinese, may also be summarily arrested by executive warrant and so deported. This was the holding of the Supreme Court in *Low Wah Suey vs. Backus*, 225 U. S. 460. ANY ALIEN may be physically unfit or deficient, and hence ANY SUCH ALIEN, including Chinese, may also be summarily held without our borders, or if here, arrested by executive warrant and so deported. In *re Lee Sher Wing*, 164 Fed. 506, 24 Op. Atty. Gen. p. 706. In each of these instances the subject of the proceedings might be a Chinese alien, or a non-Chinese alien. Eliminate the Chinese Exclusion or Expulsion Act entirely, and the indicated Chinese person who entered surreptitiously, who was morally objectionable or physically unfit, might still be so proceeded against. That, we submit, is the true test as to whether any particular interpretation of the General Immigration Law would in effect be an amendment, a repeal or an alteration of the existing Chinese Exclusion or Expulsion Act. If the Chinese Exclu-

sion or Expulsion Acts are necessary to support a cause of action, then it is an alteration or amendment thereof, and to that extent a repeal of its provisions, to proceed in a manner contrary to that authorized by the Chinese Exclusion or Expulsion Acts.

In the case at bar, if the Chinese Exclusion or Expulsion Acts were eliminated, there would be no cause of action under the General Immigration Law. The government claims a violation solely of the Chinese Exclusion or Expulsion Laws, and claims that the subject thereof is deportable therefore in the manner provided for in the General Immigration Law because of the said phrase "OR OF ANY OTHER LAW OF THE UNITED STATES." The appellant claims that to do this is to violate the said section 43, which says that the General Immigration Law "SHALL NOT BE CONSTRUED TO REPEAL, ALTER OR AMEND EXISTING LAWS RELATING TO THE IMMIGRATION OR EXCLUSION OF CHINESE PERSONS OR PERSONS OF CHINESE DESCENT."

In its opinion herein the court decides the point adversely to the appellant on the authority of U. S. vs. Wong You, 223 U. S. 67, and Backus vs. Ow Sam Goon, 235 Fed. 847. As to the first case we have shown that Wong You was deportable for a direct violation of the General Immigration Law, not for what was solely a violation of the Chinese Exclusion or Expulsion Laws. In the Ow Sam

Goon case the charge was that the Chinese person had surreptitiously re-entered the United States, that is,—entered without inspection, thus violating section 34 of the General Immigration Act and Sec. 13 of the Act of Sept. 13, 1888, of the Chinese Exclusion and Expulsion Acts. Here we have the same point which was before the Supreme Court in the Wong You case. In its opinion this court held (235 Fed. 849-850):

“MORROW, Circuit Judge (after stating the facts as above) (1, 2):

1. It is clear that whatever authority is possessed by the Secretary of Labor to deport aliens found in this country is derived from the Immigration Act of February 20, 1907, c/1134 (34 Stat. 898908), and not from the Chinese Exclusion Act of September 13, 1888, c.1015 (25 Stat. 476), which vests such authority only in United States courts and justices, judges and commissioners thereof.

2. It is contended by appellant that, from the opinion above mentioned, it is apparent that the lower court considered only the legality of the assistant secretary's finding in the warrant of deportation that the alien was in the United States in violation of section 7 of the Chinese Exclusion Act. and either overlooked or ignored the finding that the alien was in the United States in violation of section 36 of the Immigration Act.

There is nothing in the opinion suggesting that the court either overlooked or ignored the finding that the alien was in the United States in violation of section 36 of the Immigration Act; on the contrary, the decision is based upon the question of jurisdiction of the assistant secretary under that act."

Apply the test before suggested by eliminating the Chinese Exclusion and Expulsion Acts, and Ow Sam Goon would have been deportable under the General Immigration Law for his surreptitious entry or entry without inspection, had the facts established such a re-entry, which in his case they happily did not. Hence these two cases do not go to the extent of the point presented by this case. The intention of Congress must prevail in construing this statute, its terms are to some extent conflicting.

Happily we are now not without light as to the intention of Congress in the use of that phrase of the General Immigration Laws. The act under consideration was in force Feb. 20, 1907, to July 1st, 1916. Section 19 has been amended in the new act in a manner entirely unnecessary if the opinion of this court correctly expressed the former will of Congress. Note the final clause to the Sec. 19 of the new act:

"PROVIDED FURTHER: That any person who shall be arrested under the provisions

of this section, on the ground that he has entered or been found in the United States in violation of any other law thereof which imposes on such person the burden of proving his right to enter or remain, and who shall fail to establish the existence of the right claimed, shall be deported to the place specified in such other law. In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Secretary of Labor shall be final."

Section 43 of the old act is embraced in Sec. 38 of the new act. Note the alteration:

"PROVIDED, that this act shall not be construed to repeal, alter, or amend existing laws, relating to the immigration or exclusion of Chinese persons or persons of Chinese descent, except as provided in section nineteen thereof."

We cannot impute to Congress the enactment of useless legislation, but on the contrary, feel that the act as amended is to be construed as a new departure now, for the first time, authorizing and legalizing an Executive deportation proceeding, under the General Immigration Laws for solely a violation of the Chinese Exclusion or Expulsion Acts. This was the interpretation placed on the act by the Circuit Court of Appeals for the 5th and 7th Circuits, as pointed out in our brief herein.

Upon appellant's behalf it is felt that a judicial hearing or even another executive hearing, now that he will have had prior and adequate notice thereof, will afford appellant an opportunity to present evidence upon his behalf and be represented by counsel at such hearing, and then fully and adequately protect his right of residence in the United States by presenting evidence upon his own behalf and having the benefit of counsel.

Respectfully submitted,

GEO. A. McGOWN,
Attorney for Appellant.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for a rehearing is in judgment of counsel well founded, and is not interposed for delay.

GEO. A. McGOWAN,
Attorney for Appellant.

United States
Circuit Court of Appeals
For the Ninth Circuit.

MAH SHEE, by CHAN LEUNG,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco, California,
Appellee.

Transcript of Record.

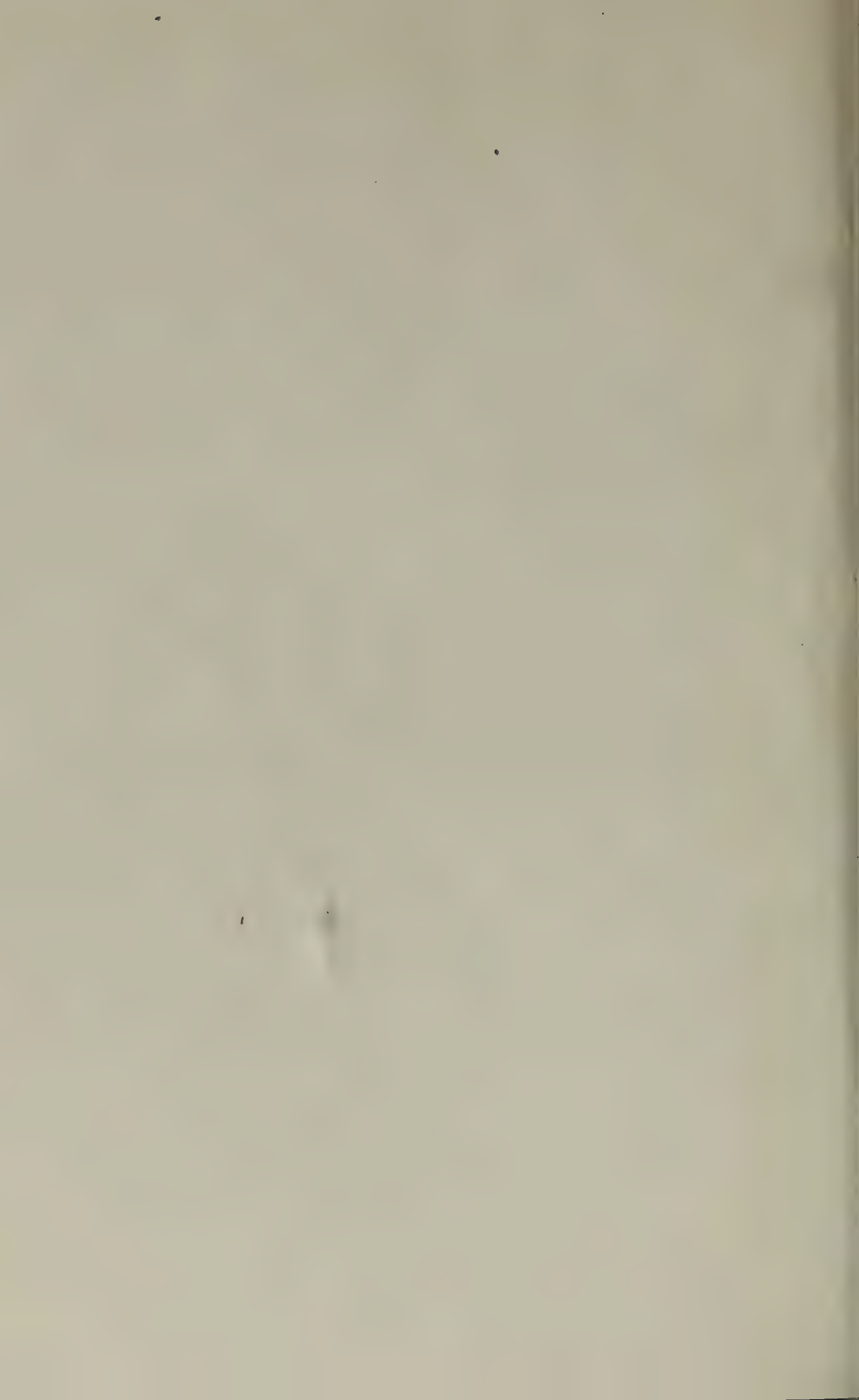
Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.

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United States
Circuit Court of Appeals
For the Ninth Circuit.

MAH SHEE, by CHAN LEUNG,

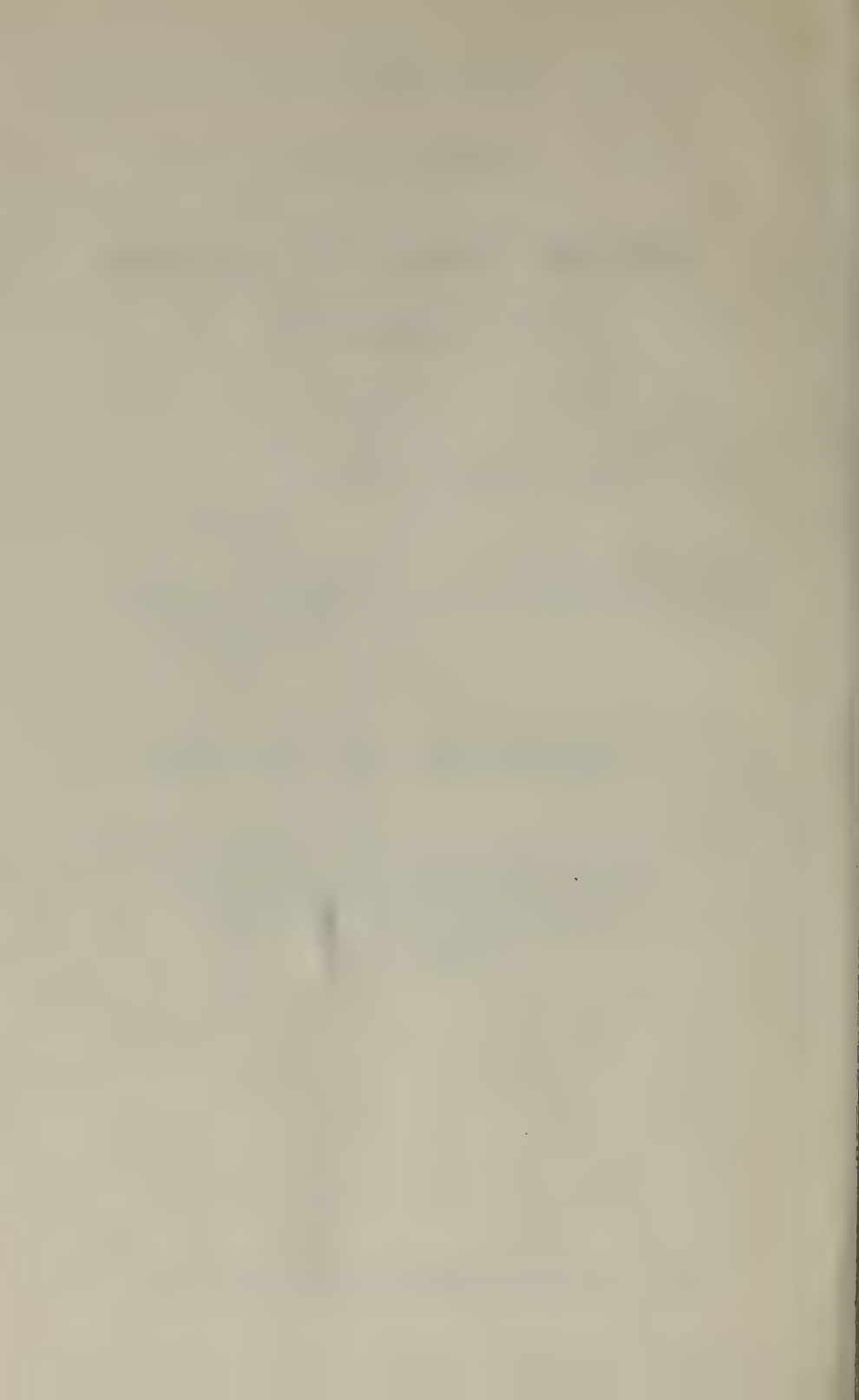
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EDWARD WHITE, as Commissioner of Immigration
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Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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*In the Southern Division of the District Court of the
United States, Northern District of California,
First Division.*

No. 16,118.

In the Matter of MAR SHEE, on Habeas Corpus.

Names and Addresses of Attorneys.

For the Detained and Appellant: GEO. A. McGOWAN, Esq., San Francisco.

For the Respondent and Appellee: U. S. ATTORNEY, San Francisco, Cal.

*District Court of the United States, in and for the
Northern District of California, Southern Division,
First Division.*

No. 16,118.

In the Matter of the Application of MAH SHEE,
on Habeas Corpus.

(Praeceptum for Transcript on Appeal.)

To the Clerk of Said Court:

Sir: Please make up Transcript of Appeal in the
above-entitled case, to be composed of the following
papers, to wit:

1. Petition for Writ of Habeas Corpus.
2. Order to Show Cause.
3. Demurrer to Petition.
4. Minute Order Regarding Immigration Record.
5. Judgment and Order Dismissing Order to
Show Cause and Denying Petition for Writ.
6. Notice of Appeal.
7. Petition for Appeal.

8. Assignment of Errors.
9. Order Allowing Appeal.
10. Citations on Appeal—Original and Copy.
11. Order Extending Time to Docket Case.
12. Stipulation and Order Regarding Immigration Record.
13. Pages 59 to 61, inclusive, from Immigration Record.
14. Clerk's Certificate.

GEO. A. McGOWAN,
Attorney for Petitioner.

Due service and receipt of a copy of the within praecipe is hereby admitted this 15th day of January, 1917.

JNO. W. PRESTON,
U. S. Attorney, Northern District of California,
Attorney for Respondent.

[Endorsed]: Filed Jan. 15, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

*In the District Court of the United States, in and
for the Northern District of California, South-
ern Division, First Division.*

No. 16,118.

In the Matter of the Application of MAH SHEE,
on Habeas Corpus.

*Page-number appearing at foot of page of original certified Transcript of Record.

Petition for Writ.

To the Honorable MAURICE T. DOOLING,
United States District Judge, in and for the
Northern District of California, First Division:

It is respectfully shown by the petition of Chan
Leung—

That Mah Shee, hereinafter in this petition referred to as the “detained,” is unlawfully imprisoned, detained, confined and restrained of *his* liberty by Edward White, Commissioner of Immigration for the Port of San Francisco at the Immigration Station at Angel Island, County of Marin, State and Northern District of California, Southern Division thereof; that said imprisonment, detention, confinement and restraint are illegal, and that the illegality thereof consists in this, to wit:

That it is claimed by the said Commissioner that the said detained is a Chinese person and an alien not subject or entitled to admission into the United States under the terms and provisions of the Acts of Congress of May 6th, 1882, July 5th, 1884, November 3d, 1893, and the Act of Congress of April 29th, 1902, as amended and re-enacted by Section 5 of the Deficiency Act of April 7th, 1904, which said acts are commonly known and referred to as the Chinese Exclusion or Restriction Acts; and that he, the said Commissioner, intends to deport the said detained away from and out of the United States to the Republic of China. [2]

That the said Commissioner claims that the said detained arrived at the Port of San Francisco on or

about the 16th day of August, 1916, on the steamship "Tenyo Maru" and thereupon made application to enter into the United States as the wife of a native born citizen thereof, that is to say, as the wife of your petitioner, who is a native-born citizen of the United States and who accompanied his wife, the said detained, from China to the Port of San Francisco upon the said steamship, and that your petitioner was thereupon permitted to re-enter the United States as a native-born citizen thereof; and that the application of the said detained to enter the United States as such wife of a native-born citizen thereof was denied by the said Commissioner of Immigration, and that appeal was thereupon taken from the excluding decision of the said Commissioner of Immigration to the Secretary of the Department of Labor and that the said Secretary thereafter dismissed the said appeal. That it is admitted that the said detained was admissible to the United States under the General Immigration laws thereof, and that she is a Chinese family woman of respectability. That it is claimed by the said Commissioner that the said detained was accorded a full and fair hearing; that the action of the said Commissioner and said Secretary was taken and made by them in the proper exercise of the discretion committed to them by the statutes in such cases made and provided and in accordance with the regulations promulgated under the authority contained in said statutes.

But, on the contrary, your petitioner, on his information and belief alleges that the hearing and pro-

ceedings had herein and the action of the said Commissioner and the action of the said Secretary was and is in excess of the authority committed to them by said rules and regulations and by said statutes and that the denial of the application of the said detained to enter into the United States as the wife of a native-born citizen thereof, was and is an abuse of [3] the authority committed to them by the said statutes in each of the following particulars hereinafter set forth:

First. That the evidence submitted upon the application of the said detained to enter the United States was of such a conclusive kind and character, and was of such legal weight and sufficiency that it was an abuse of discretion upon the part of the said Commissioner and the said Secretary not to be guided thereby and it was further an abuse of discretion as aforesaid upon the part of the said officers to refuse to accept the said testimony and the report and recommendation of the Examining Immigration Inspector before whom alone appeared the applicant and your petitioner in said case, and before whom the applicant and your petitioner gave their testimony herein. That the said Immigration Inspector was directed to hear the said case by orders of the said Commissioner, and the said detained and your petitioner having appeared before the said Inspector, and the said Inspector having heard the said detained and your petitioner and taken their testimony by question and answer, and having the opportunity of observing their manner and conduct, while under examination, and having

seen and observed the same, and having reported herein that the demeanor of the said witnesses was satisfactory, and that none of them were discredited before the Immigration Service, and having found from all the evidence so taken by him as aforesaid that the said detained was entitled to admission into the United States as the wife of a native-born citizen thereof, that it was an abuse of discretion for the said Commissioner, who did not have the said detained or your petitioner before him, and had not the opportunities for judging of their credibility, as had the Inspector, to set aside the report and recommendation of the said Inspector and deny the application [4] of the said detained to enter the United States, and it was further an abuse of discretion for the reasons aforesaid for the said Secretary of Labor to affirm the said excluding decision of the said Commissioner, and to refuse to be guided by the report and recommendation of the said Inspector before whom alone, of said officers, the applicant and your petitioner appeared and gave their testimony, and your petitioner therefore alleges, upon his information and belief, that the said detained is so illegally restrained of her liberty for the reason aforesaid, and the said adverse action of the said Commissioner, and the said Secretary, was, your petitioner alleges upon his information and belief, arrived at and done in denying the said detained the fair hearing and consideration of her case to which she was entitled, and your petitioner further alleges upon his information and belief that the action of the said Commissioner and the said Sec-

retary of Labor, in thus disregarding the said evidence, was done in excess of the discretion committed to them by the acts hereinbefore mentioned, and in violation of the constitutional rights of the said detained as the wife of a native-born citizen of the United States, and your petitioner further alleges upon his information and belief that had the same testimony as was presented herein upon behalf of the said detained, been presented upon behalf of a person of any other race than the Chinese, that the said evidence would not have been so disregarded, and disrated, and your petitioner further alleges, therefore, that the action of the said Secretary of Labor was influenced against the said detained and her said witnesses solely because of their being of the Chinese race, and in disregard of the fact that the husband of the detained is conceded to be a citizen of the United States by the said Commissioner of Immigration and the [5] said Secretary of Labor, and your petitioner therefore alleges that the discrimination mentioned was both unjust and illegal.

Second. That the hearing accorded said detained before the said Commissioner and the said Secretary was not a full or a fair hearing, but on the contrary the right of the said detained to be represented by counsel was unduly infringed upon in such a way and manner as to prevent the said detained from presenting all of the evidence possible of submission upon her behalf before the said Commissioner and the said Secretary, and in this particular your petitioner alleges that upon the denial of the case of the said detained by the said Commissioner that the said

detained, through her attorney, filed a written request with the said Commissioner, which said written request was dated September 18, 1916, requesting that the report and recommendation of the Examining Inspector and of the reviewing officer of the Law Section be opened to the inspection of the attorney for the said detained, so that the said detained, through her attorney, might make answer thereto by evidence or argument before the said Commissioner and the said Secretary of the Department at a time when it would be in the power of the said detained to submit additional evidence in support of her said appeal, and that said report or review of the Examining Inspector and the law officer were open to the inspection of the attorneys practicing before the Department at Washington, your petitioner contending that these reports should be open to the inspection of your petitioner and the detained and their attorney at a time when he could make answer thereto by evidence or argument as may be deemed necessary, but that the said Commissioner of Immigration did in a written communication, under date of September 19th, 1916, deny said request, and by virtue of the said denial prevented the said detained from submitting evidence on her behalf showing her [6] right to enter the United States, and thus prevented her having a full and fair hearing of her said application to enter the United States.

Your petitioner further alleges that upon the 20th day of September, 1916, the said detained and your petitioner, through their attorney, caused to be filed a written application to the said Secretary request-

ing that the said attorney be permitted an interview with his client, the detained in this matter, that her said husband, with whom she had journeyed from China to this country, so that the said detained might have an opportunity of submitting additional evidence on behalf of her application to enter the United States, but that the said application was denied by the said Commissioner in a written communication dated September 25th, 1916, wherein the right of counsel of the said detained was unduly curtailed and so limited in its application as to prevent and deprive the said detained of any real substantial benefit of counsel, and in this particular your petitioner alleges that the said detained does not speak the English language, and that it was necessary for the said attorney to have an interpreter in order to confer with the said detained, and that your petitioner, as husband of the said detained, would have acted in that capacity, and the action of the Commissioner in preventing and depriving the said detained of the right to confer with her counsel, and to prevent and deprive her of any knowledge as to why her case had been denied, and thus preventing her a fair opportunity of submitting additional evidence upon behalf of her appeal, was an unjust discrimination that deprives said detained of her liberty without due process of law.

Your petitioner further alleges that upon the 27th day of September, 1916, he caused a written request to be filed with the said Commissioner asking permission that the said detained, who [7] journeyed from China to the port of San Francisco with

your petitioner, her husband, be allowed to be visited by your petitioner, so that he might be permitted to see, talk to, confer with and console and comfort his wife, the said detained, but that the said Commissioner denied said request, and your petitioner alleges that ever since the arrival of his wife, the said detained, at the port of San Francisco, up and to the present time, she has been kept in close detention and custody by the said Commissioner, and held *incommunicado*, not knowing and not being informed as to why her application to enter the United States had been denied, thus preventing any and all opportunity of submitting evidence upon her own behalf in support of her said appeal in her endeavor to gain admission to the United States as the wife of your petitioner. That your petitioner has in his possession a copy of all the testimony given in said matter, together with a copy of the letters addressed to the Commissioner, herebefore referred to, and the original of the answers from the Commissioner, herebefore referred to, and that all of said papers, documents and testimony which are in the possession of your petitioner are submitted herewith under a separate cover, and are hereby referred to with the same force and effect as has been set forth herein. That your petitioner has not a copy of the proceedings of the said case which took place before the said Secretary of Labor at Washington, and that there is no copy of said proceedings now within the jurisdiction of this Court, and it is therefore impossible for your petitioner to procure a copy thereof to submit with this petition in time to prevent the deportation here-

inbefore and hereafter referred to.

That it is the intention of the said Commissioner to deport the said detained away from and out of the United States by the steamer "Nippon Maru," sailing from the port of San Francisco upon [8] the 25th day of November, 1916, at one o'clock P. M. and unless this Court intervenes and stays said deportation, the said detained will be deprived of her right to enter the United States and join her husband, your petitioner, and take up her residence with her husband within the United States.

That your petitioner verifies this petition for and upon behalf of his wife, the said detained, and upon his own behalf as the husband of the said detained, for the reason that the said detained is held *incommunicado*, in close custody and confinement, and has been deprived of the right to see and consult her attorney, and see or be seen by her husband, and hence is unable to verify said petition upon her own behalf.

WHEREFORE, your petitioner prays that a writ of *habeas corpus* may be issued herein, directed to the said Commissioner of Immigration, directing him to produce the body of the said detained, together with the time and cause of her detention before this Honorable Court at a time and place to be specified in said order, together with such further and other relief as to the Court may seem proper in the premises, and that the said detained may be restored to her liberty and permitted to take up her domicile in the United States as the wife of your

petitioner, and that she go hence without day.

CHAN (Chinese Characters) LEUNG,
Petitioner.

GEO. A. McGOWAN,
Attorney for Petitioner, Bank of Italy Building,
San Francisco, California. [9]

UNITED STATES OF AMERICA.

State and Northern District of California,
City and County of San Francisco,—ss.

Chan Leung, being first duly sworn, deposes and
says:

That he is the petitioner named in the foregoing
petition; that the same has been read and explained
to him and he knows the contents thereof; that the
same is true of his own knowledge except as to those
matters which are therein stated on his information
and belief, and as to those matters he believes it to
be true.

CHAN (Chinese Characters) LEUNG.

Subscribed and sworn to before me this 24 day of
November, 1916.

[Seal] THOMAS S. BURNES,
Notary Public in and for the City and County of San
Francisco, State of California.

(CHINESE PICTURE.)

Photograph of Petitioner.

Due service and receipt of a copy of the within
Petition and Order is hereby admitted this 24 day
of Nov., 1916.

JNO. W. PRESTON,
U. S. Attorney, Northern District of California,
Attorney for Respondent.

[Endorsed]: Filed Nov. 24, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [10]

*In the District Court of the United States, in and for
the Northern District of California, Southern
Division, First Division.*

No. 16,118.

In the Matter of the Application of MAH SHEE on
Habeas Corpus.

Order to Show Cause.

Good cause appearing therefor and upon reading the verified petition on file herein, it is hereby ordered that Edward White, Commissioner of Immigration for the Port and District of San Francisco, appear before this Court on the 29 day of November, 1916, at the hour of 10 o'clock, A. M. of said day, to show cause, if any he has, why a writ of *habeas corpus* should not be issued as prayed for; and that a copy of this order be served upon the said Commissioner, and a copy of said petition upon the United States Attorney.

AND IT IS FURTHER ORDERED that the said Edward White, Commissioner of Immigration, as aforesaid, or whoever, acting under the orders of said Commissioner, or the Secretary of Labor, shall have the custody of the said Mah Shee, are hereby ordered and directed to retain the said person within the custody of the said Commissioner of Immigration and within the jurisdiction of this Court until its further order herein.

Dated San Francisco, California, November 24, 1916.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Nov. 24, 1916. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [11]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 9th day of December, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable MAURICE T. DOOLING, District Judge, et al.

No. 16,118.

In the Matter of MAH SHEE, on Habeas Corpus.

(Minutes of Hearing on Order to Show Cause.)

This matter came on regularly this day for hearing on the order to show cause as to the issuance of a writ of *habeas corpus* herein. Geo. A. McGowan, Esq., was present as Attorney for the petitioner and detained. C. A. Ornbaun, Esq., Assistant United States Attorney, was present on behalf of respondent and presented and filed Demurrer to the petition for writ of *habeas corpus* and by consent of attorney for detained, the Court ordered that the Immigration Records, likewise presented, be filed and marked as Respondent's Exhibit "A" and "B" and that the same be considered as a part of the said original peti-

tion. Said matter was then argued by counsel for respective parties and submitted. [12]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,118.

In the Matter of the Application of MAH SHEE on Habeas Corpus.

Demurrer to Petition for Writ of Habeas Corpus.

Now comes the respondent, Edward White, Commissioner of Immigration at the Port of San Francisco, in the State and Northern District of California, and demurs to the petition for a writ of *habeas corpus* in the above-entitled cause and for grounds of demurrer alleges

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of *habeas corpus*, or for any relief thereon.

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of *habeas corpus* be denied.

JOHN W. PRESTON,
United States Attorney,
CASPER A. ORNBAUN,
Asst. United States Attorney,
Attys. for Respondent.

Copy received. Dec. 9, 1916.

GEO. A. MCGOWAN,
Atty. for Pet.

[Endorsed]: Filed Dec. 9th, 1916. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy. [13]

*In the Southern Division of the United States Dis-
trict Court, for the Northern District of Cali-
fornia, First Division.*

No. 16,118.

In the Matter of MAH SHEE, on Habeas Corpus.

**(Order Sustaining Demurrer to Petition for a Writ
of Habeas Corpus and Denying Petition for
Writ.)**

GEORGE A. MCGOWAN, Esq., Attorney for
Petitioner.

JOHN W. PRESTON, Esq., United States At-
torney and CASPER A. ORNBAUN, Esq.,
Assistant United States Attorney, Attor-
neys for Respondent.

**ON DEMURRER TO PETITION FOR A WRIT
OF HABEAS CORPUS.**

The demurrer to the petition for a writ of *habeas
corpus* herein is sustained, and said petition denied.
December 15th, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Dec. 15, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [14]

*In the District Court of the United States, in and for
the Northern District of California, Southern
Division, First Division.*

No. 16,118.

In the Matter of the Application of MAH SHEE on
Habeas Corpus.

Notice of Appeal.

To the Clerk of the Above-entitled Court, and to the
Hon. JOHN W. PRESTON, United States At-
torney for the Northern District of California:

You and each of you will please take notice that
Mah Shee, the detained herein, by Chan Leung, the
petitioner herein, do hereby appeal to the Circuit
Court of Appeals of the United States for the Ninth
Circuit from the order made and entered herein on
the 15th day of December, 1916, sustaining the de-
murrer and denying the petition for a writ of habeas
corpus filed herein.

Dated San Francisco, California, December 19th,
1916.

GEO. A. MCGOWAN,
Attorney for Petitioner, Detained and Appellants
herein.

Due notice and receipt of a copy of the within
Notice of Appeal is hereby admitted this 20 day of
Dec., 1916.

JNO. W. PRESTON,
U. S. Attorney, Northern District of California,
Attorney for Respondent.

[Endorsed]: Filed Dec. 21, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [15]

*In the District Court of the United States, in and for
the Northern District of California, Southern
Division, First Division.*

No. 16,118.

In the Matter of the Application of MAH SHEE, on
Habeas Corpus.

Petition for Appeal.

Comes now Mah Shee, the detained, by Chan Leung, the petitioner, who are the appellants herein, and say:

That on the 15th day of December, 1916, the above-entitled Court made and entered its order denying the petition for a writ of *habeas corpus* as prayed for and filed herein, in which said order certain errors are made to the prejudice of the appellants herein, all of which will more fully appear from the assignment of errors filed herein;

WHEREFORE these appellants pray that an appeal may be granted in their behalf to the Circuit Court of Appeals of the United States for the Ninth District for the correction of the errors so complained of, and further that a transcript of the record, proceedings and papers in the above-entitled cause as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit. It is further prayed that during the pendency of the said appeal the said Mah Shee may be granted

her liberty and remain at large upon a bond in the sum of \$1,000, conditioned that she remains within the United States and renders herself in execution of whatever judgment is finally entered herein.

Dated San Francisco, California, December 19th, 1916.

GEO. A. McGOWAN,
Attorney for Petitioners, Detained and Appellants
Herein. [16]

Due service and receipt of a copy of the within Petition for Appeal is hereby admitted this 20 day of Dec. 1916.

JNO. W. PRESTON,
U. S. Attorney, Northern District of California,
Attorney for Respondent.

[Endorsed]: Filed Dec. 21, 1916. W. B. Maling,
Clerk. By T. L. Baldwin, Deputy Clerk. [17]

*In the District Court of the United States, in and for
the Northern District of California, Southern
Division, Division No. 1.*

No. 16,118.

In the Matter of MAH SHEE, on Habeas Corpus.

Assignment of Errors.

Comes now Mah Shee, the detained herein, by Chan Leung, petitioner herein, both of whom are appellants herein, by their attorney, George A. McGowan, Esquire, in connection with their petition, for a hearing herein, assign the following errors which they aver occurred upon the trial or hearing

of the above-entitled cause, and upon which they will rely, upon appeal to the Circuit Court of Appeals for the Ninth Circuit, to wit:

First. That the Court erred in denying the petition for a writ of *habeas corpus* herein.

Second. That the Court erred in not holding that it had no jurisdiction to issue a writ of *habeas corpus*, as prayed for in the petition herein.

Third. That the Court erred in not holding that the allegations contained in the petition herein, for a writ of *habeas corpus*, were sufficient in law, to justify the granting and issuing of a writ of *habeas corpus*, as prayed for in the said petition.

Fourth. That the Court erred in holding that the immigration authorities had accorded the appellant, Mah Shee, a fair hearing in the matter of her application to enter the United States.

Fifth. That the Court erred in holding that it was not an abuse of discretion and did not prevent the appellant from having a fair hearing for the immigration authorities to refuse her the [18] right to be interviewed by her attorney for the purpose of submitting additional evidence upon appeal.

Sixth. That the Court erred in holding that it was not an abuse of discretion and did not prevent the appellant from having a fair hearing for the immigration authorities to refuse to permit her to have the right of a conference and consultation with her attorney after the denial of her case by the Commissioner of Immigration, and during the pendency of the said appeal before the Department of Labor.

Seventh. That the Court erred in holding that

it was not an abuse of discretion and did not prevent the appellant from having a fair hearing for the Commissioner of Immigration to withhold from the inspection of her attorney the report and review upon which the denial of the said Commissioner was based.

Eighth. That the Court erred in holding that it was not an abuse of discretion and did not deprive the appellant of a fair hearing for the Commissioner of Immigration and the Secretary of Labor to refuse to be guided by the report of the examining Immigration Inspector, who was the only officer who came in contact with the witnesses submitting evidence in said matter, and who was the only officer who had an opportunity of observing their conduct and demeanor while upon the witness-stand.

WHEREFORE, the appellants pray that the judgment and order of the United States District Court, in and for the Northern District of the State of California, made and entered herein in the office of the clerk of said court on the 15th day of December, 1916, discharging the order to show cause and dismissing the petition for a writ of *habeas corpus* be reversed and that this cause be remitted to the said lower court with instructions to discharge the said Mah Shee from custody, or grant her a new trial before the lower court, by directing the issuance of a writ of *habeas* [19] *corpus*, as prayed for in said petition.

Dated San Francisco, California, December 19th, 1916.

GEO. A. MCGOWAN,
Attorney for Appellants.

Due service and receipt of a copy of the within Assignment of Errors is hereby admitted this 20 day of Dec., 1916.

JNO. W. PRESTON,
U. S. Attorney, Northern District of California,
Attorney for Respondent.

[Endorsed]: Filed Dec. 21, 1916. W. B. Maling,
Clerk. By T. L. Baldwin, Deputy Clerk. [20]

*In the District Court of the United States, in and
for the Northern District of California, South-
ern Division, Division No. 1.*

No. 16,118.

In the Matter of MAH SHEE on Habeas Corpus.

Order Allowing Petition for Appeal.

On this 20th day of December, 1916, comes Mah Shee, the detained herein, by Chan Leung, the petitioner herein, both of whom are appellants herein, by their attorney, George A. McGowan, Esquire, and having previously filed herein, did present to this Court their petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, intended to be urged and prosecuted by them, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may seem proper. And it appearing to the Court that the said detained having first applied

to the Immigration authorities for permission to enter the United States that the application for a writ of *habeas corpus* on her behalf was not in that sense an application in the first instance to enter the United States by the said detained, and the application of the said detained for a writ of *habeas corpus* having been seen, heard and determined by this Court that the application for appeal presented with the said petition for appeal is not an application to the Court for appeal in the first instance, and in consideration of the importance of the legal points involved in said appeal, the Court does—

IN CONSIDERATION WHEREOF, hereby allows the appeal herein [21] prayed for, and orders and directs that the order of deportation made and entered by the said Commissioner of Immigration and so affirmed by the said Secretary of Labor, and the order of remand made and entered herein be stayed, pending the hearing of the said case in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated San Francisco, California, December 21, 1916.

M. T. DOOLING,

United States District Judge.

Due service and receipt of a copy of the within order allowing appeal is hereby admitted this 21st day of December, 1916.

JNO. W. PRESTON,

U. S. Attorney, Northern District of California.

Attorney for Respondent.

[Endorsed]: Filed Dec. 21, 1916. W. B. Maling,
Clerk. By T. L. Baldwin, Deputy Clerk. [22]

(Citation on Appeal—Copy.)

UNITED STATES OF AMERICA,—ss:

The President of the United States, to EDWARD WHITE, Commissioner of Immigration, Port of San Francisco and to JOHN W. PRESTON, Esq., the U. S. Attorney, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, Southern Division, Division No. 1, wherein Mah Shee and Chan Leung are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, this 20th day of December, A. D. 1916.

M. T. DOOLING,
United States District Judge.

Service of the within Citation on Appeal and receipt of a copy thereof is hereby admitted this 21st day of December, 1916.

JNO. W. PRESTON,
U. S. Attorney.

[Endorsed]: Filed Dec. 21, 1916. W. B. Maling,
Clerk. By T. L. Baldwin, Deputy Clerk. [23]

(Extracts From Immigration Record.)

McGOWAN & WORLEY,
Attorneys and Counsellors at Law,
Bank of Italy Building.

S. E. Corner Montgomery and Clay Streets.
Rooms 302, 303 and 304.

Telephone Kearny 3092.

San Francisco, Sept. 20, 1916.

Hon. Edward White,
Commissioner of Immigration,
Port of San Francisco.

Dear Sir:—

In re MAH SHEE,
15502/7-13, ex. SS. "Tenyo Maru,"
August 16th, 1916.

This applicant has been detained at this port since the 16th of August. She has been held incommunicado by you, and has been permitted no communication with her husband, nor he with her since said time. Her case has been denied, and such proceedings as have been had with respect thereto are now a matter of record. We have just received your letter denying our application to have the review of

the Law Section open to our inspection.

We now request an interview with this applicant with her husband as a basis for the introduction of further evidence in support of her appeal.

Yours very respectfully,

McGOWAN & WORLEY,

By GEO. A. McGOWAN,

Attorneys for Applicant.

GAMCG/s.

Referred to Mr. Wilkinson.

W. T. B.

(Time Stamp) [24]

U. S. DEPARTMENT OF LABOR.

Immigration Service.

Office of the Commissioner

San Francisco, Cal.

15502/7-13

September 25, 1916.

Messrs. McGowan and Worley,

Attorneys-at-Law,

Bank of Italy Bldg., San Francisco.

Sirs:

Replying to your letter of the 20th instant, in re Mah Shee, wife of a native, ex. SS. "Tenyo Maru," August 16, 1916, you are advised that the request contained therein, that you, as counsel, and the applicant's alleged husband be permitted to interview the applicant as a basis for the introduction of further evidence in support of her appeal, must be denied, as there is no authority, in either the law or

regulations, for such a procedure.

Respectfully,

Exact copy as signed by W. T. BOYCE,

Acting Commissioner.

Mailed this day of K.

WHW/ASH. [25]

McGOWAN & WORLEY,

Attorneys and Counsellors at Law,

Bank of Italy Building.

S. E. Corner of Montgomery and Clay Streets.

Rooms 302, 303 and 304.

Telephone Kearny 3092.

San Francisco, Sept. 27, 1916.

Hon. Edward White,

Commissioner of Immigration,

Port of San Francisco.

(Time Stamp)

Dear Sir:—

In re MAH SHEE,

wife of native, 15520/7-13,

ex. SS. "Tenyo Maru," Aug. 16, 1916.

This applicant having been held incommunicado at your station since the 16th day of August, 1916, she having been kept separate, apart, and away from her husband during all of that time the husband now desires to request that he be permitted to see, talk to, comfort and console his wife, who journeyed with

him to this country on the same boat and to whom you have denied admission.

Yours very respectfully,

McGOWAN & WORLEY,

By GEO. A. McGOWAN,

GAMcG/s.

Attorneys for Applicant.

9/27/16.

Insp. Wilkinson has case.

9/27/16.

To Miss Wilson,

CDM. [26]

District Court of the United States, in and for the Northern District of California, Southern Division, First Division.

No. 16,118.

In the Matter of the Application of MAH SHEE, on Habeas Corpus.

Stipulation and Order Respecting Withdrawal of Immigration Record.

IT IS HEREBY STIPULATED and agreed by and between the attorney for the Petitioner and Appellant herein, and the attorney for the respondent and appellee herein, that the original immigration record in evidence and considered as part and parcel of the petition for a writ of habeas corpus upon hearing of the demurrer in the above-entitled matter, may be withdrawn from the files of the clerk of the above-entitled court and filed with the clerk of the United Circuit Court of Appeals in and for the Ninth

Circuit, there to be considered as a part and parcel of the record on appeal in the above-entitled case with the same force and effect as if embodied in the transcript of the record and so certified to by the Clerk of this Court.

Dated San Francisco, California, January 15, 1917.

GEO. A. McGOWAN,

Attorney for Petitioner and Appellant.

JNO. W. PRESTON,

United States Attorney for the Northern District of California,

Attorney for Respondent and Appellee. [27]

Order.

Upon reading and filing the foregoing stipulation, it is hereby ordered that the said Immigration record therein referred to, may be withdrawn from the office of the clerk of this Court and filed in the office of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, said withdrawal to be made at the time the record on appeal herein is certified to by the clerk of this Court.

M. T. DOOLING,

United States District Judge.

Dated San Francisco, California, January 15th, 1917.

Due service and receipt of a copy of the within stipulation and order is hereby admitted this 15th day of January, 1917.

JNO. W. PRESTON,

U. S. Attorney, Northern District of California,

Attorney for Respondent.

[Endorsed]: Filed Jan. 15, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [28]

*District Court of the United States, in and for the
Northern District of California, Southern Division,
First Division.*

No. 16,118.

In the Matter of the Application of MAH SHEE, on
Habeas Corpus.

(Order Extending Time to Docket Case.)

Good cause appearing therefor, and upon motion
of George A. McGowan, Esquire, attorney for the
appellant herein, it is hereby ordered that the time
within which the record in the above-entitled cause
may be docketed in the office of the clerk of the
United States Circuit Court of Appeals for the
Ninth Circuit is hereby extended for a period of
twenty (20) days from and after the date hereof.

Dated San Francisco, California, January 12th,
1917.

M. T. DOOLING,
United States District Judge.

Due service and receipt of a copy of the within
is hereby admitted this 12 day of January, 1917.

JNO. W. PRESTON,
U. S. Attorney, Northern District of California,
Attorney for Respondent.

[Endorsed]: Filed Jan. 12, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [29]

*District Court of the United States, in and for the
Northern District of California, Southern Division,
First Division.*

No. 16,118.

In the Matter of the Application of MAH SHEE, on
Habeas Corpus.

(Order Extending Time to Docket Case.)

Good cause appearing therefor, and upon motion of George A. McGowan, Esquire, attorney for the appellant herein, it is hereby ordered that the time within which the record in the above-entitled cause may be docketed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, is hereby extended for a period of thirty (30) days from and after the date hereof.

Dated San Francisco, California, January 31st,
1917.

M. T. DOOLING,

United States District Judge.

The foregoing extension of time is hereby stipulated and agreed to by and between the counsel for the respective parties hereby.

JNO. W. PRESTON,

United States Attorney, Representing Respondent.

GEO. A. MCGOWAN,

Attorney for Petitioner.

[Endorsed]: Filed Jan. 31, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [30]

Certificate of Clerk U. S. District Court to Transcript on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing 30 pages, numbered from 1 to 30, inclusive, to contain a full, true, and correct transcript of certain records and proceedings, in the Matter of Mar Shee, on Habeas Corpus, No. 16,118, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with "Praecipe for Transcript on Appeal" (copy of which is embodied in this transcript), and the instructions of the attorney for the detained and appellant herein.

I further certify that the cost for preparing and certifying the foregoing Transcript on Appeal is the sum of Fourteen Dollars and Eighty Cents (\$14.80), and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the Original Citation on Appeal, issued herein, page 32.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 13 day of February, A. D. 1917.

[Seal]

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk.

(Citation on Appeal—Original.)

UNITED STATES OF AMERICA,—ss:

The President of the United States, to EDWARD WHITE, Commissioner of Immigration, Port of San Francisco, and to JOHN W. PRESTON, Esq., the U. S. Attorney, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, Division No. 1, wherein Mah Shee and Chan Leung are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, this 20th day of December, A. D. 1916.

M. T. DOOLING,
United States District Judge. [32]

[Endorsed]: No. 16,118. In the Southern Division of the United States District Court, for the Northern District of California, First Division. In re Mah Shee, Appellant, vs. Edward White, et al.,

Respondents. Citation on Appeal. Filed Dec. 21, 1916. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk.

Service of the within citation on appeal and receipt of a copy thereof is hereby admitted this 21st day of December, 1916.

JNO. W. PRESTON,
U. S. Attorney.

[Endorsed]: No. 2946. United States Circuit Court of Appeals for the Ninth Circuit. Mah Shee, by Chan Leung, Appellant, vs. Edward White, as Commissioner of Immigration at the Port of San Francisco, California, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed March 1, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals,
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

**Certificate of Clerk U. S. District Court as to
Original Exhibits.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the accompanying exhibits, viz., Respondent's Exhibits "A" and "B" (Immigration Record) are original exhibits, intro-

duced and filed, in the matter of Mar Shee, on Habeas Corpus, No. 16,118, and are herewith transmitted to the U. S. Circuit Court of Appeals, for the Ninth Circuit, as per order of this Court, which is embodied in transcript on appeal herewith.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of February, A. D. 1917.

[Seal]

WALTER B. MALING,

Clerk.

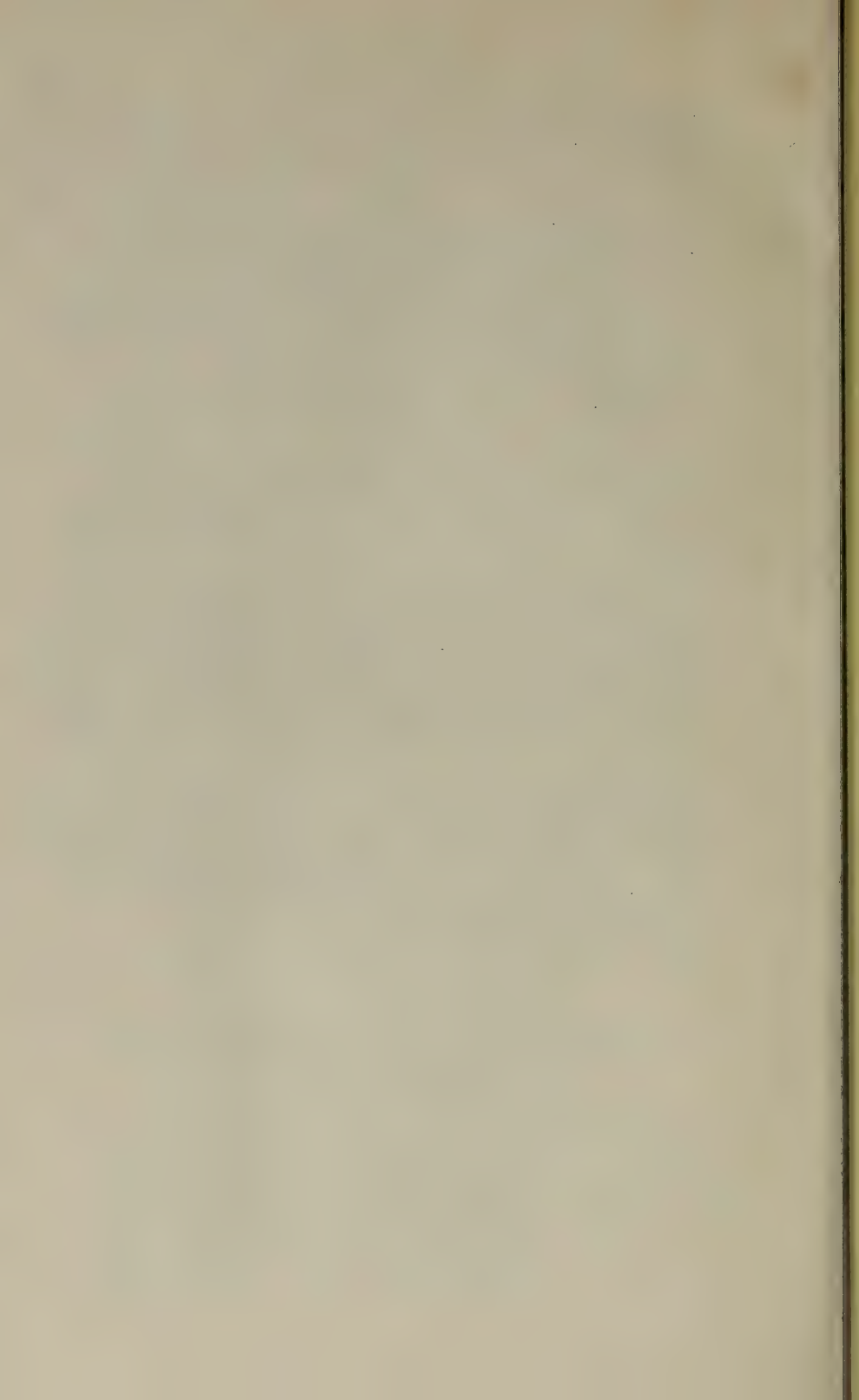
By C. W. Calbreath,

Deputy Clerk.

CMT.

[Endorsed]: No. 16,118. U. S. District Court, Northern District of California, First Division. In the Matter of Mar Shee on Habeas Corpus. Certificate of Clerk, U. S. District Court, as to Original Exhibits.

No. 2946. United States Circuit Court of Appeals for the Ninth Circuit. Certificate of Clerk U. S. District Court to Original Exhibits. Filed Mar. 1, 1917. F. D. Monekton, Clerk.



No. 2946

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

In re:
MAH SHEE, on habeas corpus,
Appellant,
vs.
EDWARD WHITE, as Commissioner, etc.
Appellee.

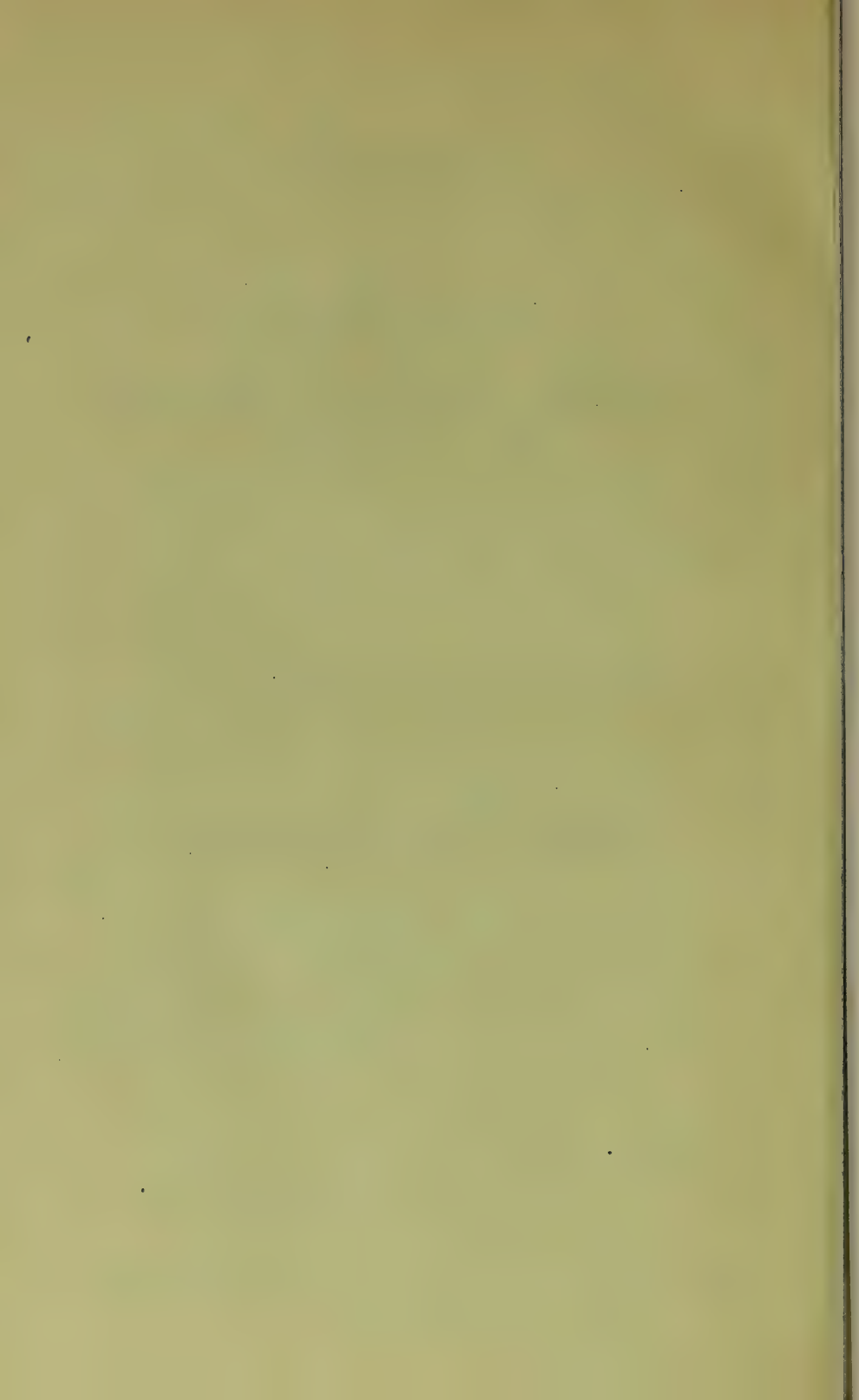
Brief for Appellant

GEO. A. McGOWAN,
Attorney for Appellant.
Bank of Italy Building,
San Francisco, California.

Filed
MAY 2 1917

Filed this.....day of May, 1917. F. D. Monckton
Frank D. Monckton, Clerk.

By.....Deputy Clerk.



No. 2946

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

In re:

MAH SHEE, on habeas corpus,

Appellant,

vs.

EDWARD WHITE, as Commissioner, etc.

Appellee.

Brief for Appellant

STATEMENT OF THE CASE.

Chang Leung is a native-born citizen of the United States who returned from a temporary visit to China on the 12th day of August, 1916, on the steamer Tenyo Maru, which arrived at the port of San Francisco on said date. He was immediately ordered re-admitted into the United States as a citizen thereof, by the Commissioner of Immigration (Tr. 4, Ex. "B".)

Chang Leung was accompanied on said return trip

by his wife Mah Shee. Her application to enter the United States as the wife of a citizen thereof was heard before the Immigration Inspector Warner, under orders of the said Commissioner, and after a painstaking and thorough examination he found her to be the wife of a native-born citizen of the United States and recommended her landing as such. This recommendation was not followed by the Commissioner who disregarded the report and finding of the only officer before whom the witnesses appeared, and denied her case. (Tr. 5 and 6, Ex. "A" p. 20-1.)

A reopening was asked and granted, additional ex parte evidence was received but not made the subject of an examination, and the case was again denied.

A request was filed on September 18th, 1916 by the attorney for this couple asking that the report showing the reasons or evidence used for the denial of the wife's case be opened to his inspection, so that proper answer by evidence or argument might be made thereto. (Tr. 8, Ex. "A" p. 54-5.) Said request was denied on September 19th, 1916 (Tr. 8, 25, Ex. "A" p. 56.) A request was filed on September 20, 1916, requesting the right or privilege of the attorneys for the alien to have an interview with her with her husband, so that he might do the interpreting, so that she might be personally informed of the state and condition of her case and evidence obtained from her to submit on behalf of her appeal (Tr. 8, 9; 25 and 26, Ex. "A" p. 59.) This request was denied on September 25th, 1916. (Tr. 9; 26 and 27, Ex. "A" p. 60.)

A request was filed on September 27th, 1916, requesting permission for the husband to see, talk to and confer with and console and comfort his wife, she having traveled from China with him to this port, and having been held incommunicado ever since her said arrival. (Tr. 9 and 10; 27, Ex. "A" p. 61.) This request was denied on September 27th. (Tr. 10, Ex. "A" 62.) The appeal to the Secretary of Labor was dismissed and the appellant ordered returned to China. (Tr. 4 and 11, Ex. "A" 71-72.)

A petition for a writ of habeas corpus was filed by the husband on his own behalf and on behalf of his wife. (Tr. 3 to 12) and the Immigration Record of said detained wife was filed with the lower court on the hearing of the demurrer (Tr. 14 and 15.) The Demurrer was sustained (Tr. 16.) This appeal is taken therefrom.

POINTS URGED.

1. That the evidence presented was of such a conclusive character that it was an abuse of discretion to refuse to be guided thereby.

2. That the hearing was unfair in that the right of counsel was so curtailed as to negative its value to the alien, and deprive her of the right to submit evidence and properly defend herself.

FIRST:

Upon the first point we have to submit that the steamer arrived on August 16th, the husband was examined on Thursday, August 17th, the wife was examined on Friday, August 18th, and on Monday, the 21st day of August, the husband and wife were re-examined, the case closed and reported for landing on August 22nd, Tuesday, by examining Immigration Inspector Warner. This Inspector was the only official to see the witnesses, observe their manner of testifying and their demeanor while under examination. He, as such Examining Immigration Inspector, was satisfied with the *bona fides* of the case, and reported it for landing, the Inspector having been satisfied the case should have been landed.

U. S. v. Sing Tuck et als. 194, U. S. 161.

“If the person satisfies the Inspector, he is allowed to enter the country without further trial.”

The Examining Inspector is virtually the trial court, as he alone conducts this hearing and presides thereat. The importance of such an officer is ably set forth by this Court in the case of Woey Ho vs. U. S. 109, Fed. 888, wherein it is held, p. 890:

“A court is not at liberty to arbitrarily and without reason reject or discredit the testimony of a witness upon the ground that he is a Chinaman, an Indian, a negro, or a white man. All

people, without regard to their race, color, creed or country, whether rich or poor, stand equal before the law. It is the duty of the courts to exercise their best judgment, not their will, whim or caprice, in passing upon the credibility of every witness. The question whether a witness is credible must ordinarily be determined by the tribunal before whom the witness appears, and in the decision of which that tribunal must necessarily be vested with a very wide discretion. In weighing the scales, the conduct, manner and appearance of the witness, as seen by the tribunal, often forms an important factor in enabling courts, as well as juries, to determine whether or not the witness is entitled to credit. Appellate courts are, in the very nature of the case deprived of the opportunity to apply this test, which in a doubtful case might control the judgment of the trial court.”

and further showing that discretion may not be arbitrarily exercised the court further held, p. 891:

“It may be said that the present case comes nearer the border line, beyond which courts must not go****”

The action of the Commissioner and the Secretary in disregarding evidence which is of a conclusive character, is an abuse of discretion:

Low Wah Suey vs. Backus 225 U. S. 460.

Ex Parte Lee Kow 161, Fed. 592.

U. S. vs. Chin Len, 187 Fed. 544.

1 Cyc. 219 and 14 Cyc. 383-4.

Sharon vs. Sharon, 75 Cal. 48.

Rothrock vs. Carr 55 Ind. 334-5.

There must be some supporting evidence to sustain a rejection by the Immigration authorities.

Whitfield vs. Hanges, 222 Fed. 745.

Ong Chew Lung vs. Burnett, 232 Fed. 853.

Chan Kam vs. U. S. 232 Fed 855.

U. S. vs. Redfern, 210 Fed. 548.

In case of the U. S. vs. Fong On 240 Fed. 234, it is held p. 235

“Except for this, the case would really be devoid of much question, if the defendant and his witness were not Chinamen. The temptation to claim citizenship is very great, no doubt, and absolute certainty I do not think the case admits of, but I must give some credence to the testi-

mony of men who, so far as one can see, have the usual ear-marks of veracity under the circumstances. If they were Italians, or Irish, or Germans, or Jews, no one would very seriously assert that I ought with justice to disregard their testimony, even where they had the burden of proof. I do not know, and surely I ought not to assume, that Chinamen are less likely to speak the truth than any one else. Until there is some authoritative requirement to the contrary, I ought not to have any preconceived notions about it."

SECOND:

Upon the second point we have to submit that this couple journeyed to this port on the same steamer as husband and wife, associating and living together as such. From the arrival of the wife at the immigration station, they are not permitted to see or hold converse with one another. This continues all through the examination of the case before the examining Inspector, its consideration before the Commissioner, and before the Department at Washington. In other words, the wife is held incommunicado from arrival until ultimate and final action by the last authority. This upon the theory that her case is still pending in its various stages, and even the last authority, the Secretary of Labor, might direct her re-examination. All of this procedure is designed to aid the Immigration authorities in carrying out their preconceived ideas about safeguarding the supposed rights of the government but, we feel, with small regard for the rights of the human object of their extreme surveillance. The regulations give her the right of counsel. Rule five is in part as follows:

Rule 5 (b) "Applicant's counsel shall be permitted, after notice of appeal has been duly filed, to examine the record upon which the excluding decision is based, and may be loaned a copy of the transcript of testimony contained therein. * * The word 'record' as used in this paragraph shall not be construed to include memoranda of comment or letters of transmittal unless they con-

tain evidence additional to that in the record proper.

(c) "The notice of appeal shall act as a stay upon the disposal of the applicant until a final decision is rendered by the Secretary of Labor; and, within ten days after the excluding decision is rendered, unless further delay is required to investigate and report upon new evidence, the complete record of the case, together with such briefs, affidavits and statements as are to be considered in connection therewith, shall be forwarded to the Secretary of Labor by the officer in charge at the port of arrival, accompanied by his views thereon in writing. If, on appeal, evidence in addition to that brought out at the hearing is submitted, it shall be made the subject of prompt investigation by the officer in charge and be accompanied by his report."

It is apparent that the Immigration Inspector must hear all of the witnesses submitted. *Chin Yow vs. U. S.* 208 U. S. 8. When the case is denied an attorney may appear and appeal the case. The report which shows the reasons for the denial is withheld. The attorney reviews only the testimony. He feels that his client, the detained, should be re-examined on some point or points to fully develop facts which by reason of but the partial disclosure, have been held to prejudice her application. He requests that she be

examined thereon. The request is refused. He asks to be permitted to interview his client to submit *ex parte* from her evidence which the Immigration authorities were first requested to, but refused to take themselves. The wife being an alien Chinese speaking only the Chinese language, it was necessary to have some one to interpret. Who could inspire her confidence, and let her know that the attorney, previously unknown to her, had been employed for her but her husband and for this reason her husband was to be present to interpret. The Immigration office have many government interpreters, who could have been present at the interview which was sought to see that nothing improper was said, suggested or done, but notwithstanding this, the Commissioner of Immigration refused to permit the attorney to consult his own client. The regulations permit the submission of additional evidence after denial, and obviously, a proper person from whom to submit such evidence, would be from the applicant herself, but this was refused when her verbal re-examination was requested, and then the interview was also refused which would have resulted in the submission of her affidavit. The rule above quoted states that affidavits may be submitted, yet the action of the local Commissioner is to absolutely prevent the submission of an affidavit from an applicant for admission. Upon broad general grounds, we urge and present to the attention of the court that an applicant for admis-

sion is, under the regulations, entitled to the right of counsel, and this of necessity, implies the right to see and consult her counsel, possibly under safeguards, but certainly that is an unfair hearing which absolutely prevents and deprives an applicant for admission from any opportunity at all from seeing, consulting and conversing with her counsel. Such a stand is so un-American, that it is inconceivable to us how or why such a request should have been denied by the Commissioner of Immigration, or why the Secretary of Labor should have upheld such a course of procedure. Everything there is in our American system of Government which bespeaks of liberty, justice and fairness is transgressed by the course of procedure here protracted, and we feel that it should be condemned by this court.

In the case of *ex parte* Ung King Ieng, 213 Fed. 119, at page 121, the court held:

“The petitioner had no power to produce these witnesses, and if she desired to prove anything by them, or if she desired to test their knowledge of the facts to which they had testified against her, it seems to me that ordinary fairness required that she be permitted to do so. It was suggested at the argument of this question before the court that it would be a “nuisance” to permit cross-examination. Perhaps it would, but to the petitioner the whole proceeding was probably a nuisance. The rights of the petitioner may not be wholly measured by the convenience or inconvenience to the immigration officers in

affording her a fair hearing. Their efforts should be directed to the ascertainment of the truth. They have vast powers accorded them by the law, and these powers should be fairly exercised. It is not necessary, of course, that prolonged cross-examination be permitted. Much must be left to the discretion of the officer. But I am firmly of the opinion that, when the officer in this case refused to permit the petitioner's counsel to ask a single question of witnesses in attendance, and testifying to important matters against her, she did not receive that fair treatment which the law contemplates and to which she was entitled. The demurrer will be overruled and the writ issued."

In the case of *ex parte* Lee Dung Moo, 230 Fed. 746, page 747, the court held:

"It is manifest from the foregoing quotations, and indeed has also appeared from records submitted here in other cases, that the Immigration Bureau looks upon this statute, in so far as it may be applicable to persons of the Chinese race, with an unfriendly eye. The absolute citizenship therein provided for, and the rights pertaining to such citizenship, are regarded as 'at best only technical,' while to the plain language of the statute is added by construction the provision that it does not apply, unless the foreign-born child of the American citizen shall learn the English language and come to the United

States before he is 25 years of age. I conceive it to be the duty of executive as well as of judicial officers fairly and freely to administer the laws of Congress as they find them, whether they agree with the policy or purpose of such laws or not. In the instant case the very law which would entitle the applicant to admission into this country is regarded with such hostility as to be cast into the balance against him. If applicant is the son of a resident American citizen, he, too, is a citizen, and entitled to every right as such. The question of relationship should, therefore, be fairly investigated, with a view to ascertain the truth, and with a perfect willingness to admit him as a citizen under this law, instead of being investigated in a spirit hostile to the law, which, lacking the power to repeal, accomplishes the same result by denying to it effect. When one's right as a citizen is examined in that spirit, the hearing given him appears to me to be anything but fair."

The above two cases quite clearly indicate and show the spirit of hostility and slight regard at least, in those cases, characterizing the action of these same Immigration officers. This is also explained in the case of *ex parte* Leong Wah Jam, 230 Fed. 540; *ex parte*, Tom Toy Tin, 230 Fed. 747, *ex parte*, Ng Doo Wong, 230 Fed. 751.

It is respectfully submitted that the action of the Immigration authorities in the present case is vir-

tually to hold and decide that the applicant for admission is a nonentity that does not need to be considered and consulted by her counsel at all. The regulations provide for a notice of denial in the Chinese language but according to the procedure followed, that is about all that she may ever know of her case. The actual testimony presented why it was rejected and not acted upon, are considerations that more vitally affect her than any other person in the world, yet under the ruling in this case she is not permitted to know anything about the reasons why her case is denied. She is denied the right to consult her attorney, and the rights of her counsel and attorney are so limited and circumscribed, that she is deprived and prevented from any opportunity to submit evidence upon her own behalf, after the denial of her case, in clear contravention of the right contained in the regulations.

The record further discloses a request which was also denied, which shows that the husband, who journeyed from China to this country in the same boat with his wife, might not even visit and speak to her, to offer comfort and consolation even after her case had been transmitted to the Department on appeal, but he must wait under this procedure until after the month or six weeks which must elapse before the appeal would be determined by the Secretary of Labor, before he could see his wife. This is all clearly shown in the record.

Citations bearing on the right of counsel, may be found in Weeks on "Attorney and Client," page 310,

Section 145; page 335, Section 155; page 381, Section 184; page 535, Section 261; page 536, Section 262; also Bishop's New Criminal Procedure, Volume 1, Sections 299 and 301.

A further showing of unfairness contained in this case, has to do with the refusal of the Immigration authorities to confront the husband of this appellant with certain prior declarations. The brief on file in this case before the immigration officers requesting a re-opening of the case, sets forth the grounds therefore, and the additional matters about which the investigation was requested, including certain matters about which certain former testimony of the husband was construed against his wife, without giving him any opportunity of explaining the same. This is objected to, citing Jones on Evidence, 2nd edition, page 1075, wherein it is held:

“But there is hardly any more familiar practice in judicial procedure than that of impeaching witnesses by *proof* of their *former statements* which are *inconsistent with their present testimony*. Since such attempted impeachment is a direct attack upon the testimony of the witness, and may result in serious consequences, it is important that the practice should be so regular that the witness may have full *opportunity to admit, deny or explain* any statements which is thus assailed.”

In finally submitting this case we desire to say that it is, in our judgment, conclusively shown by the evi-

dence submitted in this case, that this appellant is entitled to enter the United States, as the wife of a citizen thereof, and that it was a clear abuse of discretion and disregard of the evidence for any other action to have been taken than to admit the applicant and we submit, that the action taken by the Immigration authorities, is in our judgment, based and founded upon an unjust suspicion without any foundation to support it and upon this point we direct the attention of the court to the case of *ex parte* Lam Pui reported in 217 Fed. 456, the particular part being from page 467 and 468, in which it is held:

“It is elementary that in judicial proceedings the question whether the record discloses any evidence is for the Court. The weight to be given evidence is for the trier of the issue of fact. It is also elementary that mere suspicion, conjectures, speculation, is not evidence, neither can it be made the basis for finding a fact in issue. The industry of counsel affords a number of illustrative expressions of Courts. In *People vs. Van Zile*, 143 N. Y. 372, 38 N. E. 381, Andrews, Chief Justice, says:

‘Suspicion cannot give probative force to testimony which in itself is insufficient to establish or to justify an inference of a particular fact.’

Judge Caldwell, in *Boyd vs. Glucklich*, 116 Fed. 131, 53 C. C. A. 451, well says:

‘The sea of suspicion has no shore, and the court that embarks upon it is without rudder or compass.’ ”

This is an admission case and not one of exclusion. In exclusion cases the right of bail exists, and of course, the object of said proceedings, has unlimited right of conference and consultation with her counsel. There is sufficient similarity in the aims, objects and purposes sought to be attained by Congress through deportation and exclusion proceedings, to require that in admission proceedings the right of counsel, which is accorded an applicant for admission, must of necessity, be at some time, when it will be of some service, and certainly during the pendency of her case, and when she yet has the right of submitting evidence on her behalf, have the opportunity of consultation with her counsel. In the present case this right was not asked until after the preliminary examination, and until after her case had been denied, and when there yet remained but the right of appeal to the Department. It was not even asked until the Executive officers had refused to conduct the re-examination requested. It was only urged as a method of procuring other evidence, when all other ways and methods had been ineffectually tried, and it is respectfully submitted that the procedure is so wrong, that it has resulted in depriving this detained to the fair though summary hearing, to which she was entitled, and the writ should therefore issue, and the case be tried upon its merits.

U. S. vs. Chin Yow, 208 U. S. 8.

Low Wah Suey vs. Backus, 225 U. S. 460.

Respectfully submitted,

GEO. A. McGOWAN,
Attorney for Appellant.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In re MAH SHEE, on Habeas Corpus,
Appellant,

vs.

EDWARD WHITE, as Commissioner,
etc.
Appellee.

BRIEF FOR APPELLEE.

Upon Appeal from the Southern Division of the United States
District Court for the Northern District of California,
First Division.

Filed

JUN 1 - 1917

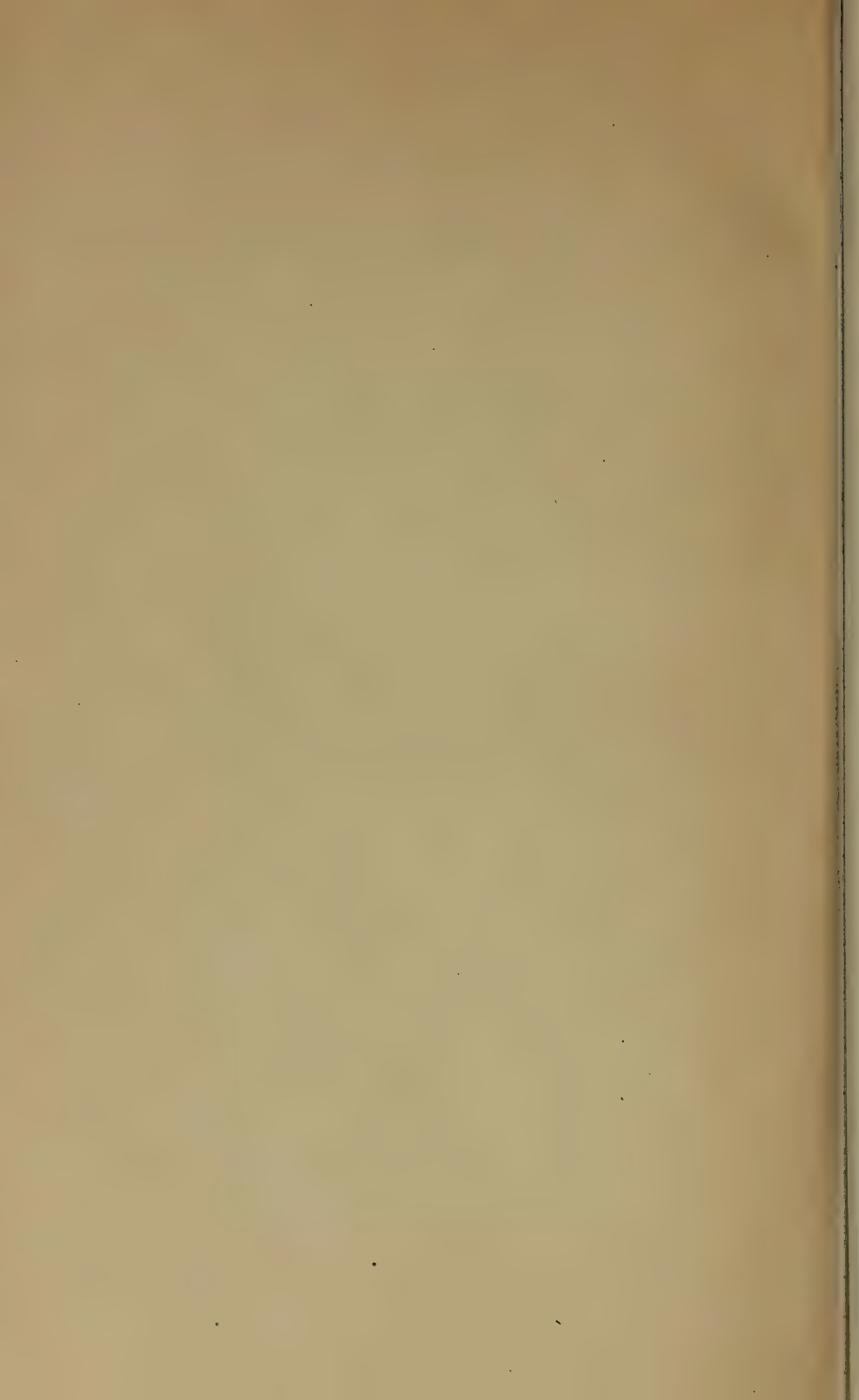
JOHN W. PRESTON,
United States Attorney,
CASPER A. ORNBAUN,
Asst. United States Attorney,
Attorneys for Appellee.

F. D. Monckton,
Clerk.

Filed this day of May, 1917.

FRANK D. MONCKTON, Clerk,

By....., Deputy Clerk.



No. 2946

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In re MAH SHEE, on Habeas Corpus,
Appellant,

vs.

EDWARD WHITE, as Commissioner,
etc.
Appellee.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE

The appellant in this case applied for admission at San Francisco to enter the United States as the wife of Chung Leung on August 16, 1916. The alleged husband was denied admission at San Francisco in July, 1898, but was finally admitted under habeas corpus proceedings in December, 1914. He applied for a pre-investigation of status and was granted a Native's Return Certificate, form 430. He then went to China and claims to have married the appellant while there on the 14th day of January, 1916.

There is nothing unusual in this case as it comes before the above entitled Court upon the same pro-

ceedings as the ordinary habeas corpus case. After the Secretary of Labor had refused to land said appellant, a petition for writ of habeas corpus was filed in the District Court and to this petition the Government interposed a demurrer. At the time of hearing the demurrer was agreed that the records of the Bureau of Immigration, which composed all of the testimony taken in the case, be admitted in evidence and considered a part of the petition for the writ of habeas corpus upon the hearing of the demurrer. It was further stipulated between the parties hereto that these original records be considered in their original form in determining this appeal and said records are now on file and marked "Exhibits A and B".

POINTS URGED ON BEHALF OF APPELLANT.

1. That the evidence presented was of such a conclusive character that it was an abuse of discretion to refuse to be guided thereby.

2. That the hearing was unfair in that the right of counsel was so curtailed as to negative its value to the alien, and deprive her of the right to submit evidence and properly defend herself.

ARGUMENT.

It can readily be seen from the points urged on behalf of appellant that the same position is taken by counsel in this case that is taken in practically every case coming before this Court, namely: that

there was an abuse of discretion on the part of the Immigration officials and that said officials were unfair and deprived the appellant or applicant of certain rights to which she was entitled; but in order to refute this contention the Government takes the position at this time that the record in this case shows in a conclusive manner that there was no unfairness on the part of the Immigration officials and that the discrepancies which appeared in the testimony introduced and considered in determining this case were amply sufficient to justify the findings of the Immigration officials and the order of the Secretary of Labor.

As stated in the brief of counsel representing appellant, there was a favorable report filed by Inspector Warner who investigated this case, and in this connection the Government desires to call attention to the fact that it is frequently the case that an Inspector will report favorably and yet his report will not be followed by the other investigating officers, and there is ample reason for this rule.

In this particular case, Inspector Warner evidently did not give serious consideration to the material discrepancies which appeared in the testimony of the applicant and the alleged husband. A review of these discrepancies will show conclusively that such was the case. From the memorandum for the use of the Commissioner, which was prepared by the law officers of the Immigration Department,

will appear the seriousness of said discrepancies. They are as follows:

“The applicant was accompanied by her alleged husband at the time she arrived at this port on the 16th inst., it being claimed that she was married to the latter in January, 1916. There is every indication that the alleged husband intended, when he departed from the United States in December, 1914, to fraudulently effect the admission of a woman to this country as his wife.

In connection with his application for a native's return certificate, he stated, on December 9, 1914 (12017/-4614) that his wife was 'still living' at that time, but the following day he filed a letter saying that she died about the 11th month of the preceding year (November-December, 1913). While the present applicant agrees with the last-mentioned date of death of her alleged husband's former wife, the alleged husband now states that she died in the 7th month of CR 2. The death of this woman is obviously fictitious, as it is incredible that any person could mistakenly testify that his wife was living, and the succeeding day offer testimony diametrically opposite.

The alleged husband, in the present case, first testified that he sent the applicant to Hong Kong to get married and that he did not marry her in his village through fear of pirates; that his father sent him a letter to Hong Kong saying that the applicant would be sent to the latter city for the purpose of marriage; and that she 'came all the way, chair and all, by

boat' and that a maid escorted her from her village to Hong Kong. The applicant states that she removed from her native village to Hong Kong at the age of five or six and lived in the latter City until her marriage. Upon recall the alleged husband testified—four days after his previous statement—that the applicant lived in Hong Kong at the time of the marriage, and sought to account for his previous testimony by stating that he might have been mistaken, all information having been received by him from the go-between.

The alleged husband, on his first hearing, stated that his father was then living in the home village (Nom Moon), which statement is confirmed by his above-mentioned assertion to the effect that he had sent a letter to the alleged husband 'in Hong Kong', and the alleged husband's further testimony that his father came to Hong Kong a few days after the marriage and stayed three or four days, renting a room adjoining his. After the applicant testified that her father-in-law had resided continuously with them in Hong Kong and was present at the marriage in that City, the alleged husband confirmed the latter statement, but offered no explanation of his previous testimony.

The alleged husband stated that his wife's mother 'lives' in the Sheung village; and that she visited him in Hong Kong, remaining about two nights, at which time he went out and slept with friends. After testifying that her mother lived in Hong Kong—the address being given—the applicant stated that her mother visited her after marriage but never remained over night,

and that her alleged husband never slept away from the house over night, this latter statement being amended on re-examination by the qualification that he visited his home village after the wedding on several occasions, remaining over night.

The alleged husband testified that the applicant made one trip to her home village after marriage, returning the second day, and that it takes six hours by boat to make the trip from said village to Hong Kong; but upon recall he stated that she did not remain over night, asserting that 'maybe he was mistaken' on the first examination, the applicant having testified that she made the trip in question but did not remain over night.

The above glaring contradictions were removed by the amended statement of the alleged husband, but the testimony is so very unconvincing as to be unworthy of belief; and there is ample authority for its rejection. In deciding the appeal of Fong Sam (printed decision No. 11) the Department referred to the case of *Ellwood vs. Telegraph Company* (45 N. Y. 549), in which the following language was used:

'It is undoubtedly the general rule that where unimpeached witnesses testify distinctly and positively to a fact, and are uncontradicted, their testimony should be credited, and have the effect of overcoming a mere presumption. * * * But this rule is subject to many qualifications. There may be such a degree of improbability in the statements themselves as to deprive them of

credit, however positively made. The witnesses, though unimpeached, may have such an interest in the question at issue as to affect their credibility. * * *.'

And in the case of *Prentis vs. Seu Leung* (203 Fed. 25), the Court said:

'We are of the opinion that this first examination was a part of the hearing contemplated by the statute, and that the Secretary was at liberty to so treat it, *even to the extent of disbelieving the second and more deliberate statement.*'

It is impossible to set forth in greater detail the character of the testimony offered in this case, but a perusal of the same would, it is believed, confirm my opinion that it is wholly false. I therefore recommend that the applicant be denied admission.

(Signed) W. H. WILLIAMSON,

WHW/ASH

Law Officer."

The Government fails to see wherein the appellant gets any satisfaction out of the case of *United States vs. Sing Tuck, et als*, 194 U. S. 161, for the only point determined in this case was that an appeal would not lie until the detained had exhausted his remedies by taking an appeal to the Secretary of Labor following an adverse decision by the Commissioner of Immigration. The Court in this case, covering the point just referred to, said as follows:

"An appeal is provided by the statute. The first mode of attacking his decision is by taking the appeal. If the appeal fails it then is time enough to consider whether upon a petition

showing reasonable cause there ought to be a further trial upon habeas corpus. * * * But before the Court can be called upon the preliminary sifting process provided by the statutes must be gone through with. Whether after that a further trial may be had we do not decide."

Nor does the Government see wherein appellant receives any comfort from the case of *Woey Hoy vs. United States*, 109 Fed. 888, as it was stated in this case on page 891, as follows:

"It is true that in all the Chinese cases this Court has been enabled, and takes pains, to point out the unreasonable, improbable and unsatisfactory points in the testimony which justified the trial court in disbelieving it. This delay, however, rests with the trial courts, and, in a certain sense, may be said to be optional with them. If no reasons are given for their action, this fact does not of itself furnish a sufficient ground to justify a reversal. Error must affirmatively appear. This court cannot assume that the court below acted arbitrarily in refusing to believe the testimony of any witness."

The Government concedes every legal proposition set forth by appellant on pages 4, 5 and 6. It is of course a well established rule of law that a court is not at liberty to arbitrarily and without reason reject or discredit the testimony of a witness upon the ground that he is a Chinaman, an Indian, a negro, or a white man. The Government never

took the position that a court or the Immigration officers ever had any such power, and certainly does not desire to take that stand at this time. Nor does the Government question the position of the appellant that there must be some supporting evidence to sustain a rejection by the Immigration authorities; but in this particular case it is difficult to understand why these propositions were cited by appellant's counsel as a review of the record, which includes the testimony and all of the proceedings covering the investigation of appellant, will show very clearly that the decision of the Secretary of Labor was based upon evidence and that there was ample evidence to support both the Secretary of Labor and the ruling of Judge Dooling.

In the second point cited by appellant herein, counsel takes the position that the wife should not be held incommunicado, but on the other hand should have the privilege of associating with her husband. The Court can readily see, however, wherein the whole object of the Immigration laws might be defeated if this were the case. For instance, if the husband in this case were permitted to communicate with his wife, it would be a very easy matter for them to clear up any discrepancies which might appear in their testimony.

An examination of the record in this case will show that every right was accorded appellant to which she was entitled. She had an opportunity to examine all of the evidence interposed in the

case. She also had an opportunity to present any evidence that she desired to present in order to meet the testimony taken by the Immigration officers.

On page 53 of Exhibit "A" there is a receipt showing that counsel reviewed the evidence introduced in this case, and in this connection the Government desires to call attention to the fact that the report of the Immigration officials upon the testimony is no part of the record to which appellant or her counsel are entitled to review. These are merely confidential matters of the Immigration Bureau and are based wholly upon the evidence presented before the report is made. If applicants were permitted to examine this report and then have the privilege of clearing up the discrepancies, there would seldom be a case where the discrepancies could not be explained, for the circumstances are always such that some explanation might be offered for any discrepancy that might appear, and this explanation could very easily be framed by witnesses after consulting together, without any respect for the truth of the matters covering the explanation. In other words, if witnesses were permitted to consult with each other and have the opportunity of clearing a discrepancy, these discrepancies might always be explained without any regard for the truth.

In this case a reopening as ordered and additional ex parte affidavits were taken and considered by the Immigration Bureau. In fact, appellant was

given every opportunity to present her case in the most favorable light, but it will be noted on pages 70 and 71 of Exhibit "A", the same being the original record of the Bureau of Immigration, that the Immigration Bureau was well satisfied that the discrepancies which appeared in the testimony were fatal to a favorable decision to appellant and it was for these reasons that her application was denied.

Assistant Secretary Louis F. Post, on page 71 of Exhibit "A", in supplementing the memorandum of the Assistant Secretary, found on page 70, after the case had been reopened and further *ex parte* affidavits considered, stated as follows:

"Since Bureau memorandum of October 26th was prepared, counsel has submitted a brief, now attached to the record, and has argued the case orally.

It is not necessary to go over the several points again. The argument made orally added nothing to that contained in the brief, and neither is at all convincing. In the main, the explanations which have been attempted do not explain. Clearly, beyond any question whatsoever, this applicant has failed to sustain the burden of proof placed upon her by the Statute, and the decision of the Commissioner at San Francisco should be affirmed.

(Signed) ALFRED HAMPTON,
Acting Commissioner-General.

APPROVED:

(Signed) LOUIS F. POST,
Assistant Secretary."

As stated in this brief, the appellant was given an opportunity to see all of the evidence taken in her case and she had ample opportunity to meet and refute it by evidence presented in her behalf. This is all that the law requires.

Low Wah Suey vs. Backus, 225 U. S. 460.

The above case also emphasizes the point of law that unless there is unfairness or an abuse of discretion, the proceedings of the Bureau of Immigration are not open to attack and the findings of the Secretary of Labor are final and conclusive.

Ekiu vs. U. S., 142 U. S. 651,

Japanese Immigrant Case, 189 U. S. p. 86,

Zakonaite vs. Wolf, 226 U. S. 272.

From the very nature of an investigation of this character, the hearing of the Executive officers must be of a summary character.

Chin Yow vs. U. S., 208 U. S. 8.

and the hearings may be conducted upon affidavits or ex parte depositions.

Ekiu vs. U. S., 142 U. S. 651,

Low Wah Suey vs. Backus, 225 U. S. 460.

In conclusion, the Government again desires to call attention to the fact that an investigation of the original record of the Bureau of Immigration, Exhibit "A" on file herein, will show beyond question that the evidence was sufficient to justify the refusal on the part of the Secretary of Labor to

admit appellant into this country as the wife of a citizen and that the judgment of Judge Dooling should be sustained.

Respectfully submitted,

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. U. S. Attorney.

*Attorneys for Appellee.*⁶

